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Brf. of Rossington & Smith for P.E.

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In the Supreme Court

OF THE

UNITED STATES.

October Term, 1900.

A. J. Tullock, Plaintiff in Error,
vs.
Joab Mulvane, Defendant in Error.
} No. 275.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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A. J. Tullock,	Plaintiff in Error,	No. 2[illegible]
vs.		
Joab Mulvane,	Defendant in Error.	

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

This is a writ of error from this court to the Supreme Court of the State of Kansas, complaining generally of the error in the affirmance of a judgment rendered by the District Court of Shawnee County in the State of Kansas. The subject of the action was a bond given in the Circuit

Court of the United States for the District of Kansas in a suit in which George P. Wescott and Samuel Hanson were complainants and Joab Mulvane, The Topeka Water Company, The Topeka Water Supply Company, Coffin & Stanton, bankers of New York, and the Atlantic Trust Company, of New York, were defendants.

The suit in which the bond was given was for specific performance and for an injunction. This is the second trial and appeal in this suit upon the bond. In the first trial judgment was rendered in favor of the plaintiff Mulvane against the defendant Tullock for such damages as the court held the Federal court might have awarded under the circumstances of the case, but excluding an allowance for attorneys' fees. The defendant in error, Mulvane, appealed the case to the Supreme Court which reversed the decision of the court below in an opinion to be found in 58 Kan. 622.

The case was again retried and a claim asserted by defendant in error in the court below for about $25,000 of attorneys' fees, and other damages. This trial resulted in a judgment in favor of Mulvane and against Tullock for the sum of $25,000 of which approximately $20,000 was for attorneys' fees. Thereupon, the case was appealed to

the Supreme Court of the State of Kansas by Tullock and this last judgment of the court below affirmed.

See, 61 Kan. 650.

The plaintiff in error has assigned for the consideration of this court a number of errors, which he alleges the court committed in the affirmance of this judgment. The assignments of error are to be found upon page 291 and following pages of the printed record.

A brief statement of the controversy and the proceedings out of which this bond grew is essential to the understanding of the case.

Statement of the Case.

The record in the Circuit Court of Appeals for the Eighth Circuit of this original suit is incorporated within and made a part of the record here, and to that record we refer the court for any additional details to those contained in this statement which we shall endeavor to make sufficiently full for the purposes of compliance with the rule of this court and for an understanding of the exact controversy between the parties here.

Joab Mulvane was the president of The Topeka

Water Supply Company, a company organized for the purpose of supplying the city of Topeka and its inhabitants with water. Messrs. Wescott and Hanson visited the city of Topeka on behalf of themselves and others for the purpose of inspecting the property and books of the Water Supply Company with a view of purchasing the entirety of its stock. Certain negotiations were entered upon and a certain offer was made in Topeka to Mulvane for such stock. Correspondence followed between the parties and on December 4, 1889, Mulvane wrote to Wescott that he would meet him in Boston on the 14th of December, and said: "I shall be able to talk and act definitely with you as to the business matter heretofore discussed."

The parties met in Boston on the 14th and entered into a contract in writing, as follows (see printed record, p. 27):

"BOSTON, December 14, 1889.

Gentlemen:

I will sell you the entire capital stock of The Topeka Water Supply Company, of Topeka, Kansas, which consists of 4,000 shares of par value of $100 per share, for the sum of five hundred thousand dollars ($500,000), on the following terms of payment, viz.: The sum of sixty thousand dollars ($60,000) to be paid in cash on the signing

of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000), to be paid as follows: The sum of two hundred thousand dollars ($200,000) to be paid February 10th, 1890, one hundred and forty thousand dollars ($140,000) to be paid February 20th, 1890, and one hundred thousand dollars ($100,000) to be paid March 20th, 1890, provided, that final payment of the last named sum of one hundred thousand dollars may be paid on February 20th, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention.

Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

JOAB MULVANE.

To Geo. P. Wescott, Samuel Hanson.

We hereby accept your offer to sell the entire capital stock of The Topeka Water Supply Company for the price and on the terms and conditions above stated.

GEO. P. WESCOTT,
SAMUEL HANSON."

Differences arose between Wescott and Hanson and Mulvane, as to the construction of the contract, and thereupon Mulvane went to New York and the day following sold the stock to Messrs. Coffin & Stanton for $550,000. Subsequently, as appears from the record, Wescott and Hanson learned of this sale by seeing a circular in

which Coffin & Stanton were proposing to reorganize this company and to issue a large amount of bonds thereon. In the meantime, and after the sale of the property to Coffin & Stanton, The Topeka Water Company was formed. An ordinance was secured from the city of Topeka authorizing the transfer of the property from The Topeka Water Supply Company to The Topeka Water Company, and The Topeka Water Company had executed and was about to negotiate and deliver to Coffin & Stanton the bonds in question. Thereupon suit was brought by Wescott and Hanson, in the United States Circuit Court for the District of Kansas, against Mulvane to compel him to perform his contract with the complainants and to enjoin him (Mulvane), The Topeka Water Company, The Topeka Water Supply Company and Coffin & Stanton from carrying out the proposed reorganization and transfer of bonds and stock of The Topeka Water Company.

The bill was filed on February 5, 1890, and on the same day Judge Foster granted a restraining order against all the parties as prayed for in the bill. On February 13th the application for the temporary injunction was heard and a temporary

injunction was allowed, a bond for $75,000 being exacted by the order to be filed on the 15th day of February, 1890 (Record, p. 123).

On the 15th of February, at the date when the bond was to be filed, the court made an order permitting the complainants to substitute a cash deposit of $75,000 for the bond. (See page 124 of the record.) The temporary injunction had been allowed upon full hearing and upon affidavits of all the parties introduced and filed.

After the temporary injunction had been allowed and before the motion to dissolve, appearances were entered for all of the defendants and answers were filed for Joab Mulvane and The Topeka Water Supply Company and a plea of The Topeka Water Company; and an application was made by Woodbury & Moulton to be made parties to the suit, which application was, by Judge Foster, denied (pp. 125, 129, 136, 144, 146, 151).

Subsequent to the order granting the temporary injunction notice was served upon the complainants of a motion to dissolve to be heard before Judge Caldwell, newly appointed United States Circuit Judge, at Little Rock, Arkansas. On April 4, 1890, hearing was had upon the applica-

tion of Coffin & Stanton, and an order dissolving the temporary injunction was made, which appears on page 164 of the record, and which is as follows:

"And now come said complainants by Rossington, Smith & Dallas, their solicitors, and also comes Joab Mulvane, The Topeka Water Supply Company and The Topeka Water Co., by A. L. Williams, J. D. McFarland, Eugene Hagan and A. A. Hurd, their attorneys, and also come Coffin & Stanton by Silas B. Jones and J. D. McFarland, their attorneys, and the motion of Coffin & Stanton to dissolve the temporary injunction issued in this cause came on for hearing, and it appearing that an indispensable party defendant to this suit is not made a defendant, and cannot be made a defendant without ousting the jurisdiction of the court, the said indispensable party defendant and the plaintiffs being citizens of the same state, and it further appearing that the court granting the temporary injunction postponed the consideration and decision of this question until the coming in of the pleadings and proofs now before me on that subject:

It is therefore ordered, considered and adjudged that the temporary injunction granted in this cause by the Circuit Court on the 13th day of February, 1890, be and the same is hereby dissolved.

April 4, 1890.

HENRY C. CALDWELL,

Circuit Judge of Eighth Circuit."

Thereupon, replication was filed to the answer of The Topeka Water Supply Company, and exceptions to the answer of Coffin & Stanton for

impertinence and the plea of The Topeka Water Company was set down for hearing. It appearing by all of the affidavits that the Atlantic Trust Company was not a necessary party to the suit, it was dismissed from the bill on the 10th of April, 1890. To the end of bringing the cause to hearing upon its merits, various stipulations and agreements were made between the parties, as is shown by the record, all of the attorneys who appeared in resistance of the application for temporary injunction, as well as all the attorneys who appeared upon the motion to dissolve, appearing as attorneys and signing these various pleadings and stipulations (p. 165, *et seq.*).

On the 2d day of June, 1890, the court permitted to be submitted for the $75,000 deposit a bond upon which George P. Wescott and Samuel Hanson appeared as principals and A. J. Tullock and W. M. D. Lee, of Leavenworth, Kansas, as sureties (p. 171). The bond will be found at page 168 of the record. Subsequent to the giving of this bond, replications were filed, stipulations were entered into and the plea of The Topeka Water Company was argued and sustained, the same attorneys appearing in all of these matters (pp. 171, 172, 173).

On the 7th day of October, 1890, the same counsel who appeared throughout, namely, A. L. Williams and J. D. McFarland, as solicitors for defendant Joab Mulvane and the two water companies, entered into certain stipulations with the complainants which appear at large upon pages 174 and 176 of the record.

By stipulation with Mulvane it was agreed that the case should be continued until the June, 1891, term, and fixing the time for the taking of testimony and apportioning the same and stipulating further that the case should be submitted and heard before the full bench of the court, meaning, we presume, that one of the circuit judges should sit with the district judge. The other stipulation, which is one of the most significant features of this case, is one between the complainants and Coffin & Stanton, The Topeka Water Company and The Topeka Water Supply Company, which for the convenience of the court is here set out in full:

"It is hereby stipulated in the above entitled cause, between the complainants and defendants, Coffin & Stanton, and The Topeka Water Supply Company and The Topeka Water Company, as follows:

1. The complainants hereby dismiss their bill as to the above named defendants, Coffin & Stan-

tion, The Topeka Water Supply Company, The Topeka Water Company, and discharge said defendants and each of them from all liability to complainants by reason of any of the matters alleged or prayed for in the bill of complaint in this cause.

2. Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane described in said bill of complaint.

3. In consideration of the above, the said defendants, Coffin & Stanton, The Topeka Water Supply Company and The Topeka Water Company, and each of them, hereby waive, release and relinquish any and all rights of action they, or any of them, may have, if any, against the plaintiffs on the injunction bond given herein or otherwise, by reason of the complainants having sued out a temporary injunction in this cause.

4. Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance.

5. Nothing contained in this stipulation shall enlarge or lessen, or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action, except as contained in paragraph 2 hereof; nor shall anything contained herein enlarge or lessen, or in any manner whatever affect the rights or remedies of Joab Mulvane against complainants in this or any other action.

ROSSINGTON, SMITH & DALLAS,
Solicitors for Complainants.

COFFIN & STANTON,
By Silas B. Jones, their Solicitor.
A. L. WILLIAMS,
J. D. MCFARLAND,
Solicitors for The Topeka Water Supply Company and The Topeka Water Company, Defendants."

On the 28th day of November, 1890, an order was made by the Circuit Court in which the stipulation was embodied, dismissing the bill as to The Topeka Water Supply Company, The Topeka Water Company and Coffin & Stanton, as the court says: "Under the terms of and in pursuance of the provisions of said stipulation." This appears upon pages 176, 177 of the record.

And thereupon an order was made carrying into effect the stipulation with reference to the taking of testimony and the hearing of the cause, such order being entered coincident with and as part of the general arrangement on November 28, 1890, such order appearing upon pages 177, 178 of the record.

And thereupon, proof was taken in the case and the same was heard before the Hon. John A. Riner, United States District Judge, who decided the cause in favor of Mulvane and against the complainants. This decree appears upon page 240 of the record and is dated September 26, 1892, and concludes as follows:

"Now, therefore, on consideration thereof, it is ordered, adjudged and decreed that the said complainants' bill of complaint be and the same is hereby dismissed, with costs to the said defendant, Joab Mulvane, to be taxed.

Thereupon, said complainants pray an appeal to the Circuit Court of Appeals, which is allowed.

Thereupon, upon application of said complainants, supersedeas bond is fixed at the sum of $1,000 and appeal allowed.

JOHN A. RINER, *Judge.*"

On page 260 of the record the following stipulation appears, made at the trial of this case in the district court:

"It is now admitted in open court, by and between the parties to this action, that within the time allowed as shown by the printed record which has been introduced, complainants Wescott and Hanson prosecuted an appeal from the decision of the United States Circuit Court to the United States Circuit Court of Appeals, and gave the bond that is required in the order, and otherwise perfected their appeal, and that the case was pending on appeal in the United States Circuit Court of Appeals at the time of the commencement of this suit on the injunction bond, and remained pending there for some time after, when it was decided."

One of the assignments of error made by the complainant upon that appeal was as follows (p. 241):

"1. The court erred in dissolving the temporary injunction theretofore granted against the defendant Joab Mulvane."

It is shown that the entire record in the cause of *Wescott and Hanson vs. Mulvane* was taken

to the United States Circuit Court of Appeals upon said appeal.

This suit on the injunction bond was in fact brought on the 5th day of November, 1892. About a year after the commencement of this suit the Circuit Court of Appeals affirmed the decree of the United States Circuit Court, the mandate being filed on December 18, 1893.

The petition of the plaintiff in the present suit made as parties defendant A. J. Tullock and W. M. D. Lee, the sureties upon the bond. The principals, Wescott and Hanson, were not mentioned as parties. Service was had upon Tullock alone and the cause proceeded solely against him. The petition as originally filed was in the ordinary form of a declaration for breach of a bond and the allegation of the breach and the accruing of the defendant's liability is stated as follows (p. 8):

"Plaintiff further alleges that such further proceedings were had in the said suit pending in the Circuit Court of the United States for the District of Kansas, that it was finally decided that the said temporary injunction was unlawfully issued, and that the said complainants were not entitled to the said injunction."

Among other defenses, was one that the action had been prematurely brought.

In the course of the trial, after the plaintiff had

closed his case, a demurrer was interposed to the evidence and was argued and overruled, and thereupon the plaintiff asked leave to amend his petition to conform to the proof which had been given in the case. The plaintiff, in the presentation of his case, offered testimony tending to prove special damages in the way of attorneys' fees, which were not mentioned nor included within the terms of his petition; to which timely objections were made upon the ground of irrelevancy, and as being special damages not pleaded, and an additional ground that the obligation being a bond of the United States Circuit Court no such damages could be allowed. The amendment to his petition proposed was one of specific allegations in this regard and supplying the deficiency of his petition in that behalf (p. 246). The defendant objected to the allowance of such amendment at that time, and his objection was overruled. The case was tried to a jury and verdict was rendered in favor of the plaintiff in the sum of $25,000. Subsequently a motion for new trial was filed in due time, presenting substantially all of the errors which we shall complain of in this brief, and was taken under advisement by the court and subsequently overruled.

Thereupon an appeal was taken to the Supreme Court and the questions fully presented upon a brief and upon specifications of error fully as complete and substantially identical with the specifications, brief and argument which we now present here to this court.

The theory upon which the District Court of Shawnee County determined the questions presented to it, as well as the theory adopted by the Supreme Court upon the argument before that tribunal, was that the bond in question was like a common law contract; was to be governed by the laws of the forum, and that no consideration was to be given to the fact that the bond originated in and was executed pursuant to an order of the Circuit Court of the United States and in a case then pending before the Federal court; or that the laws and rules governing liability upon injunction bonds in the Federal court are different from the laws and rules governing bonds in the State court on common law undertakings.

Specifications of Error.

I.

The Supreme Court of the State of Kansas erred in affirming the judgment of the district court of Shawnee County.

II.

The Supreme Court of the State of Kansas erred in failing and refusing to reverse the judgment of the said district court.

III.

The Supreme Court of the State of Kansas erred in sustaining the judgment of the court below awarding to the defendant in error attorneys' fees as part of the damages recoverable in the action, and in sustaining the action of the court below in refusing to grant the instruction requested by said plaintiff in error that the said defendant in error was not entitled to recover anything in this action on account of attorneys' fees for the reason that the bond upon which said suit was brought was given in the Circuit Court of the

United States and is governed as to the liability upon it by the law as established by the Supreme Court of the United States.

IV.

The Supreme Court of the State of Kansas erred in holding:

1. That the plaintiff was entitled to recover anything in said action on account of attorneys' fees for services rendered in resisting the application of Wescott and Hanson for a temporary injunction, and, further, in failing to hold that if attorneys' fees could be allowed at all, they could only be for legal services rendered plaintiff in procuring a dissolution of the injunction, and to be strictly limited to such services.

V.

The said Supreme Court erred in sustaining the contention of said defendant in error as to attorneys' fees, and upholding the instructions and rulings of the court below against the exception of the defendant, because from the record herein it does not appear that there was any separation and apportionment of the gross fees charged and

paid between those due for services rendered in procuring a dissolution of the injunction and those rendered generally in the case.

2. Because it does not appear that there was a separation and apportionment of the value of the services rendered by said attorneys on behalf of The Topeka Water Company, The Topeka Water Supply Company and Collin & Stanton from the services rendered to the said defendant in error, Joab Mulvane.

3. Because the said Supreme Court sustained the court below in permitting a recovery for a gross attorneys' charge by reason of stipulation and agreement said to have been made by Mulvane with the other defendants in the case, that he (Mulvane) would bear the entire charge of attorneys' fees and expenses for said parties, although no notice of such stipulation or agreement was brought to the attention of Wescott and Hanson or the said plaintiff in error, or the attorneys for said Wescott & Hanson, prior to or subsequent to the filing of the stipulation dismissing said defendants from the cause wherein said defendants, in consideration of such stipulation, released all claims and damages whatsoever; and

4. Because the court permitted proof and

charge for payment of more than one attorney fee to more than one attorney or firm of attorneys for such services in said cause.

VI.

The Supreme Court of the State of Kansas erred in not holding as error the ruling of the court below in admitting, over the objection of said plaintiff in error, as evidence to sustain the allegation of plaintiff's petition that a final decision had been had that said injunction had been unlawfully granted, the stipulation entered into on October 7, 1890, and set out in said record, and in holding that such evidence was not at variance and departure from the provisions of said bond and the allegations of said defendant in error's petition or a breach thereof.

VII.

The Supreme Court of the State of Kansas further erred in not reversing said cause, with a judgment in favor of said plaintiff in error, it appearing from said record that said plaintiff in error had demanded judgment from the court below because the liability of the said Tullock

was that of surety upon said bond, and the liability which he had assumed upon said bond was a specific one and could not accrue by the acts of the parties in making the said stipulation and agreement, but was discharged thereby, and the court below should not have given effect to said stipulation and agreement of the parties as binding upon the said plaintiff in error as surety, inasmuch as the said stipulation was not a final decision of the rightfulness of granting such injunction, and a final decision in respect thereto was by said stipulation and agreement, by the acts of the parties, without notice to or acquiescence by the said Tullock, made impossible.

VIII.

The Supreme Court of the State of Kansas erred in failing to hold the action of the court below erroneous in overruling the plea and objection of the defendant to the effect that said action was prematurely brought.

IX.

The Supreme Court of the State of Kansas

erred in refusing to hold as error the following instruction given by the court below, to wit:

"Where a suit is commenced and a temporary injunction granted and thereafter set aside, the party against whom the injunction is granted may recover upon the injunction bond given whatever actual damage he has sustained by reason of the wrongful issuance of the injunction, and the person against whom the injunction is granted may maintain an action upon the injunction bond for damages sustained at any time after the temporary injunction has been set aside or the injunction branch of the case abandoned by the plaintiff. He is not required to wait until the main action is terminated. In this case, then, if you find from the evidence that prior to the commencement of this suit a temporary injunction had been issued in the case in the Federal court and had been set aside or the injunction branch of the case abandoned by the plaintiff in the suit, then the defendant or defendants against whom the injunction had been issued could maintain an action to recover the damage sustained by reason of the wrongful issuance of the injunction."

X.

The Supreme Court of the State of Kansas erred in not reversing the said cause and holding to be erroneous the refusal of the court below to give to the jury upon the request of the plaintiff in error the following special instruction:

"If you find from the evidence that the Circuit Court of the United States had prior to the bring-

ing of this suit entered a final judgment and decree in favor of the defendant Mulvane and against Wescott and Hanson, but that thereafter within the time allowed therefor the said Wescott and Hanson had prosecuted an appeal from said judgment and decree to the United States Circuit Court of Appeals and had perfected their said appeal and said appeal was pending in said United States Circuit Court of Appeals at the time of the bringing of this suit, then and in that event this action was prematurely brought and your verdict must be for the defendant."

XI.

The said Supreme Court of the State of Kansas erred in failing to hold to be erroneous the action of the court below in overruling the motion for a new trial.

Cases and Points.

I.

The case at bar, being upon an injunction bond given under order of the United States Circuit Court for Kansas in an equity case pending before said court, is as to all of its elements a case involving Federal questions, finally cognizable and determinable in this court.

Bein vs. Heath, 12 How. 168.

Russell vs. Farley, 105 U. S. 433.

Meyers vs. Block, 120 U. S. 206.

Arnold vs. Frost, Fed. Case No. 558.

Seymour vs. Phillips & Colby Const. Co., Fed. Case No. 12,689.

Leslie vs. Brown, 32 C. C. A. 556; 90 Fed. 171.

Tyler Min. Co. vs. Last Chance Min. Co., 32 C. C. A. 498; 90 Fed. 15.

Walker vs. Windsor Nat'l Bank, 5 C. C. A. 421; 56 Fed. 76.

Coosaw Mining Co. vs. Farmers Mining Co., 51 Fed. 107.

Lea vs. Daekin, 13 Fed. 541.

Lehman vs. McQuown, 31 Fed. 138.

Crane vs. Buckley, 105 Fed. 401.

2d Beach Modern Equity Pr., sec. 770, and cases cited.

II.

Inasmuch as this suit was subject to writ of error from the Supreme Court of the United States, it was the duty of the State Supreme Court to adopt, follow and enforce the rules and decisions of this court upon the questions therein involved.

Belcher vs. Chambers, 53 Cal. 635.

San Benito Co. vs. So. Pac. R. R. Co., 77 Cal. 518.

III.

The power to impose a bond as a condition for the injunction carried with it the power to relieve or mitigate the liability thereunder in the exercise of a sound discretion by the Federal court.

Russell vs. Farley, 105 U. S. 442.

Leslie vs. Brown, 32 C. C. A. 556; 90 Fed. 171.

Tyler Min. Co. vs. Last Chance Min. Co., 32 C. C. A. 498; 90 Fed. 15.

For the foregoing reason, the fundamental error of the State Supreme Court consisted in construing the bond as an independent contract, subject exclusively to forensic rules of decision.

IV.

Counsel fees are not recoverable as an element of damage for breach of injunction bonds exacted by Federal courts.

Arcambel vs. Wiseman, 3 Dallas 306.

Bein vs. Heath, 12 How. 168.

Oelrichs vs. Spain, 15 Wall. 230.

Browning vs. Porter, 12 Fed. 460.

The Alice, 12 Fed. 502.

Jacobus vs. Monon. Bank, 35 Fed. 396.

Fidelity Ins. Co. vs. Roanoke Iron Co., 91 Fed. 21.

That this is the rule of the Federal court has been recognized in numerous State decisions.

Oliphant vs. Mansfield, 36 Ark. 195.

Dorris vs. Miller, 105 Iowa 569; 75 N. W. 483.

Thurston vs. Haskell, 81 Me. 306; 17 Atl. 74.

Wood vs. State, 66 Md. 68; 5 Atl. 479.

Frost vs. Jordan, 37 Minn. 546; 36 N. W. 714.

Hill vs. Thomas, 19 S. C. 236.

Loeb vs. Mann, 39 S. C. 470; 18 S. E. 2.

Stringfield vs. Hirsch, 94 Tenn. 432; 29 S. W. 611.

Galveston, etc., R. R. Co. vs. Ware, 74 Tex. 50; 11 S. W. 920.

Jones vs. Rosedale, 75 Tex. 383; 12 S. W. 998.

V.

This suit was brought against a surety alone in the State court. His liability is to be strictly construed and he is presumed to have obligated himself with reference to the rule of damages established by the Federal court which in this behalf is paramount. The Kansas Supreme Court accordingly committed reversible error in allowing counsel fees as an element of recovery in this case.

VI.

It appears from the record that both the trial and the Supreme Courts of Kansas held that the

injunction proceeding was either abandoned or dismissed by virtue of the stipulation (appearing upon page 175 of the record) of October 7, 1890, and which is set forth in the opening statement of the case.

Our contention is that if this stipulation had this effect, then it extinguished Tullock's liability upon the bond, for the reasons following:

(*a*) Because it precluded and prevented such final determination or decision of the rightfulness of awarding the injunction as was contemplated and provided in the bond itself.

(*b*) Because the stipulation was itself a waiver of damages upon the bond by certain parties defendant to the suit in consideration of their dismissal from the suit, and in consideration of changing the suit from one of specific performance to one for damages.

(*c*) And it appearing as an undisputed fact in the record that these parties were the same as Mulvane and that the counsel making the stipulation represented him in representing and appearing for such parties, then the agreement to waive

damages was binding upon Mulvane for all purposes, and as Mulvane directly reaped the benefit of such stipulation, he cannot maintain a proceeding against the surety.

(*d*) It further appears from the record and is admitted that such stipulation was made without the knowledge or consent of the surety and after he had executed the bond.

(*e*) By the voluntary act of the parties the condition upon which the liability depended, namely, a final decision that the injunction ought not to have been granted, was rendered impossible, and except upon such condition no liability could attach to the surety.

Palmer vs. Foley, 71 N. Y. 106.

Johnson vs. Elwood, 82 N. Y. 362.

Tyler Min. Co. vs. Last Chance Min. Co., 32 C. C. A. 498; 90 Fed. 15.

Large vs. Steer, 21 Pa. St. 30; 15 Atl. 490.

High on Inj., 3d ed., 2d vol., secs. 1638, 1639, 1640 and 1641.

Beach on Inj., sec. 227.

Apollinaris Co. vs. Venable, 136 N. Y. 46.

Col. H. V. & T. Rwy. Co. vs. Burke, 54 O. St. 98; 43 N. E. 282.

Cassem vs. Ernst, 84 Ill. App. 70.

VII.

The petition in the State court upon this bond alleged a breach of the bond corresponding to its terms, namely, that it was "finally decided that said temporary injunction was unlawfully issued."

In proof of such breach the stipulation of October 7, 1890, was permitted to be introduced as evidence, against the objection of Tullock, and error predicated upon the same to the State Supreme Court. This stipulation and the opinion of the Circuit Court of Appeals, also introduced over the objection of defendant, was the sole testimony tending to prove the abandonment or dismissal of the injunction branch of the case. The Supreme Court of the State erred in not reversing the cause for this error for two reasons: First, because, as to the stipulation it was a fatal variance between the pleading and the proof. And second, the decision of the Circuit Court of Appeals was ren-

dered more than a year after the institution of the action upon the injunction bond and was no part of the record in the case.

England vs. Gephart, 112 U. S. 502, and cases therein cited.

Also, 20 Am. & Eng. Enc. of Law, 489, and cases there cited.

VIII.

The vice in the admission of this opinion in evidence further appears that without it no proof could have been otherwise adduced as to the effect or result legally of the stipulation of October 7, 1890, and the action on the bond might have been tried and determined before the opinion had been delivered; in fact was so tried the first time.

IX.

The action on the bond was prematurely brought because:

(*a*) The equity proceeding in which the bond was given was then pending upon appeal in the United States Circuit Court of Appeals. The order

dissolving the temporary injunction was assigned as one of the errors to be reviewed upon such appeal by the United States Circuit Court of Appeals.

(*b*) Because it could not be known that the effect of the stipulation was to preclude a review until that question had been finally decided by the United States Circuit Court of Appeals.

(*c*) That the bill having been retained by consent of parties with the understanding that the case should be tried and damages assessed by the court in lieu of a decree for specific performance, and an appeal having been taken from the decision of the court in such retained cause, Mulvane was in no position pending such appeal to bring a counteraction for damages against complainants.

(*d*) That under no aspect of this case can it be rightfully contended that the case was so finally determined and decided that an action accrued upon the bond until the mandate from the Court of Appeals had been filed in the United States Circuit Court.

As to the effect of appeal in equity cases, see:

Sibbald vs. U. S., 12 Pet. 488, 490.
Stewart vs. Salamon, 97 U. S. 361.
Southard vs. Russell, 16 How. 547.
Durant vs. Essex, 101 U. S. 555.
Kingsbury vs. Essex, 134 U. S. 650.
Smelting Co. vs. Billings, 150 U. S. 31.
Gaines vs. Rugg, 148 U. S. 228.
The Bissell Carpet Sweeper Co. vs. Goshen Carpet Sweeper Co., 19 C. C. A. 25, Sixth Circuit.
Metcalf vs. City of Watertown, 16 C. C. A. 37, Seventh Circuit.

That no action accrues on the bonds pending appeal, see:

Cohn vs. Lehman, 93 Mo. 574.
Hamilton vs. State, 32 Md. 348.
Howard vs. Park, 59 How. Pr. 344.
Musgrave vs. Sherwood, 76 N. Y. 194.
Gray vs. Veirs, 33 Md. 159.
Penny vs. Holberg, 53 Miss. 567.
Murfree on Official Bonds, sec. 391.
High on Inj., sec. 1648, *et seq.*

And that until the appeal from the decree of the court on the question of damages was determined, no action accrued, see:

Thompson vs. McNair, 64 N. C. 448.
Cohn vs. Lehman, 93 Mo. 574.

Argument.

I.

The Suit, and Every Incident of It, being upon a Federal Injunction Bond, Involved Federal Questions Finally Referable to this Court upon a Writ of Error.

The fundamental error committed by the Supreme Court of the State of Kansas and by the inferior Kansas court, whose decision it affirmed, is in asserting that the bond in question, which was an injunction bond exacted by a Judge of the United States Circuit Court in a cause depending in said court and of which it had exclusive jurisdiction and cognizance, was a contract not to be determined or governed by the laws and rules and decisions of the United States in that behalf, but was to be determined as an independent contract, by the laws, rules, decisions and judgments of the local forum in which an action upon such bond might be brought. This appears in the case of *Mulvane vs. Tullock*, which was the first appeal taken in the suit upon this bond, wherein the decision of the court below

was reversed. See 58 Kan. 632. We quote from the opinion of the court:

"The bond executed is in the ordinary form; is in the nature of a contract, and the liability of the obligors depends, not on the Federal Constitution or a congressional act, but on the proper interpretation of the bond itself. In the absence of a statute fixing the measure of damages or limiting the recovery, we think the bond should be viewed in the light of an independent contract, and is to be interpreted by the general principles of the common law. It is not a mere incident of the injunction proceeding, nor can this, which is an ordinary action at law, be regarded as auxiliary to the proceeding in the Federal court. Being an independent contract, actionable in any State court where service upon the sureties can be obtained, the interpretation of the forum applies. As the action on the bond could be brought in the State court—and, indeed, the present action could not have been brought in any other—it cannot be said that the sureties contracted with reference to the view of the law taken by the Federal courts. They knew that the obligation was enforceable in the courts of the State of which the plaintiff and defendants were all residents, and that the highest court of that State had consistently held that counsel fees were recoverable upon an injunction bond."

Our contention is that the bond is a mere incident of the injunction suit; that the court exacting the bond could in the suit itself by a summary proceeding cause damages to be assessed upon the bond, or could leave the party to his action at

law upon the bond, and that such action could be instituted in the Federal court in the first instance and, if instituted in the State court, the case would be removable into the Federal court; or, if allowed to remain in the State court, the State court would occupy the position of an assessor of damages, or a master, and be governed in its determination by the rules and decisions of the Supreme Court of the United States in that behalf. But it follows that in whatever forum the bond is enforced the rule of damages must be the same. To hold otherwise would involve a manifest absurdity and accomplish a manifest injustice. For example, this case might have been removed, as we shall presently show, into the Federal court, irrespective of the citizenship of parties, because a Federal question was involved. It would be absurd, as well as grossly unjust, to say that the surety should be bound by one rule of damages in the Federal court if he should remove and suffer a large additional loss as a penalty if he failed to remove.

The language of the Supreme Court in giving significance to the mere absence of a Federal statute governing liability of sureties on injunction bonds is unwarranted and betrays an entire mis-

conception of the element of Federal jurisdiction in this behalf. The right of the surety to have his liability measured by the Federal rules depends neither upon the presence nor the absence of a statute, but upon the fact that his obligation was an incident of the chancery jurisdiction of the Federal court, and therefore inevitably governed as to every aspect and element of such liability by the rules and decisions of the Supreme Court of the United States in chancery.

No case is cited to support the view of the State Supreme Court and none can be found. That all matters relating to the enforcement of this bond are of Federal cognizance is made manifest in a multitude of decisions, among which are the following:

Bein vs. Heath, 12 How. 168.

Russell, vs. Farley, 105 U. S. 433.

Meyers vs. Block, 120 U. S. 206.

In *Arnold vs. Frost*, Fed. Case No. 558, the court held:

"On an appeal to the Circuit Court from a final decree in a suit in equity in this court, the defendant F executed a bond, with three sureties, to three obligees, who were the plaintiffs in said suit, conditioned 'that if the above named appellant shall prosecute said appeal with effect, and pay all damages and costs which shall be awarded against

him as such appellant therein, if he shall fail to make said appeal good,' the bond should be void. After the affirmance of the decree by the Circuit Court, two of the three obligees brought a suit on it in this court against the obligors, to recover on it: *Held*, that this court had jurisdiction of the suit."

In that case, Judge Blatchford, who was on the district bench, said:

"This court has jurisdiction of this suit. It is not an original suit, but is an offshoot or outbranch of the suit in which the bond was given, and jurisdiction of that suit gives jurisdiction of the subject-matter of this suit, the defendants having been duly served with process in this suit. *Jones vs. Andrews*, 10 Wall. (77 U. S.) 327; *Christmas vs. Russell*, 14 Wall. (81 U. S.) 69; *Bobyshall vs. Oppenheimer*, Case No. 1,592; *Hatch vs. Dorr*, Id. 6,206; *Gwin vs. Breedlove*, 2 How. (43 U. S.) 29; *Dunne vs. Clark*, 8 Pet. (33 U. S.) 1."

In *Leslie vs. Brown*, 32 C. C. A. 556; 90 Fed. 171, the United States Circuit Court of Appeals for the Sixth Circuit, decided:

"The court which grants an injunction, and takes an injunction bond to save the defendant from loss caused thereby, may, in an ancillary proceeding, summarily enforce such bond against the sureties.

A Federal court has jurisdiction of an action at law brought on an injunction bond taken by such court as one to enforce a right secured to the plaintiff by the constitution and laws of the United States and arising thereunder."

On page 559, Circuit Judge Taft, said:

"It is settled by the cases of *Russell vs. Farley*, 105 U. S. 433, and *Meyers vs. Block*, 120 U. S. 207, 7 Sup. Ct. 525, that the court which grants an injunction, and takes an injunction bond, to save the defendant from loss caused thereby, may, in an ancillary proceeding, summarily enforce this bond against the sureties; * * *

We have no doubt that an action at law in the Federal court may be brought on such a bond, provided the necessary amount is involved, on the ground that the plaintiff is enforcing rights secured to him under the constitution and the laws of the United States."

The United States Circuit Court of Appeals for the Ninth Circuit announced the same principle in *Tyler Mining Co. vs. Last Chance Mining Co.*, 32 C. C. A. 498; 90 Fed. 15.

See, also:

Walker vs. Windsor National Bank, 5 C. C. A. 421; 56 Fed. 76.

Crane vs. Buckley, 105 Fed. 401.

Seymour vs. Phillips & Colby Const. Co., Fed. Case No. 12,689.

Coosaw Mining Co. Farmers vs. Mining Co., 51 Fed. 107.

Lea vs. Deakin, 13 Fed. 514.

Lehman vs. McQuown, 31 Fed. 138.

The last mentioned case was a proceeding

before Mr. Justice Brewer, while on the circuit, for the assessment of damages on an injunction bond.

Also, see, 2d Beach Modern Equity Practice, sec. 770 and cases cited.

The Supreme Court of Kansas in its opinion totally misconceived the law in this respect, and for reasons sufficient to itself possibly, but which are not apparent to us, did not see fit to examine the question further or to set itself right in the subsequent consideration which it gave the case on the second appeal.

The proceeding in which this bond was given was a chancery proceeding and the rules and regulations and decisions of the courts of the United States in this behalf are therefore independent rules of procedure, not referable for their determination to the statutes and procedure in the State in which the court is held and the suit determined. The jurisdiction in equity and in law is made distinct by the terms of the Federal Constitution.

See:

Robinson vs. Campbell, 3 Wheat. 212.

Bennett vs. Butterworth, 11 How. 669.

Thompson vs. Railroad Co., 6 Wall. 134.

The conformity act (Rev. St. sec. 914) has nothing whatever to do with the proceedings in equity in the Federal court, but has application only to actions at the common law.

See, *Blease vs. Garlington*, 92 U. S. 1.

The procedure in equity is regulated by rules of the Supreme Court as modified by statutes, and the constitutional jurisdiction, where no rule has been promulgated, is held to be settled by the practice of the High Court of Chancery in England prevailing when the equity rules were adopted, so far as the same may be reasonably applied.

See:

Equity Rule 90.

Russell vs. Farley, 105 U. S. 437.

The bond in the Federal court is not a bond required to be given as a prerequisite to the obtaining of the order of injunction. It is not, therefore, like the statutory bond in the State of Kansas. It is a bond that is authorized to be given in the exercise of chancery jurisdiction by the court, and its execution rests at all times within the sound discretion of the court, and its

terms and enforcement are at all times within the court's control.

Russell vs. Farley, supra.

Tyler Min. Co. vs. Last Chance Min. Co., 32 C. C. A. Rep. 498 (90 Fed. 15).

The entire basis for the decision of the Kansas Supreme Court is necessarily involved in the language which we have heretofore quoted. The premises of the court, therefore, being radically wrong, its conclusion as a necessary and inevitable consequence must likewise fail. For example, Tullock would have had the right, under the Federal law governing removal of cases, to have removed this cause for trial to the United States Circuit Court on the ground that the plaintiff's petition showed that a Federal question was involved, and that it was a suit brought, in the language of Judge Taft, "to enforce a right secured to the plaintiff by the constitution and laws of the United States and arising thereunder." Or the plaintiff could have instituted the suit in the Federal court in the first instance; or could have applied directly to the court in the main action at the proper time for an order summarily enforcing the bond against the sureties. The selection

of the forum was a matter of election upon the part of the plaintiff, subject only to the right of removal which we have shown, because such election involved merely a question of procedure. It could not vary or make any difference to the law which should be applied, or the rule which should govern the admeasurement of his damages.

"The liability of a surety on an injunction bond must be strictly construed, and he cannot be held liable beyond the precise terms of his undertaking."

1 Beach Inj., sec. 227.

The implication of law is that in executing such bond the surety does it in the view which the established practice in courts of equity attaches to such proceedings. The entire fabric of the argument of the Supreme Court resting for its foundation upon a proposition which is untenable and so demonstrated by the unbroken current of Federal authority, the decision itself must fall so far as it attempts to apply to this bond a measure of liability recognized by the State court, but distinctly discountenanced and denied by the Federal tribunals.

II.

The Federal Question was Invoked at Every Stage of the Proceeding by Defendant and is Inescapably in this Proceeding.

The rule that the Federal question must be raised in the earliest stage of the proceeding and must be fully controverted and appear in the record in the State court brought to this court, is fully met in this proceeding. The nature of the controversy here is such that it is unnecessary to particularize any question in the case as peculiarly of Federal cognizance. The entire fabric of the case is referable to the laws of the United States and the rules of jurisprudence and procedure of the Federal courts. The plaintiff's petition upon its face discloses a Federal question upon which the defendant might have filed a petition and bond for removal into the United States Circuit Court for the District of Kansas under the authority of *Tennessee vs. Planters Bank*, 152 U. S. 454; *Leslie vs. Brown*, 32 C. C. A. 556; 90 Fed. 171.

Upon the trial in the State court when the plaintiff offered evidence tending to prove the value of attorneys' fees paid, the defendant objected, among other grounds, for the reason

(p. 16), "because it appears that this bond was given in a proceeding in the Federal court, and under the law of the United States governing the liability of parties for damages on bonds in such proceedings in Federal courts attorneys' fees are not included."

This same objection was renewed and interposed continuously throughout the trial to evidence of this character, and the defendant also filed an answer invoking the same protection (p. 425 of the record).

Numerous written instructions to the jury were duly prayed by the defendant, which are set forth in the Assignments of Error and Specifications of Error in this brief, which sought to apply the rules and law of the Federal court to the determination of the liability of the surety upon this bond (pp. 269-291).

As demonstrated by both of the opinions of the Supreme Court, the question was also fairly and fully presented in that tirbunal and a decision against the right claimed by the defendant was rendered. Indeed, we apprehend that no effort will be made by our learned adversaries to escape a fair and full decision of the merits by this court, but in the absence of their brief we deem it

proper at this time and place to show to the court that it is a question concerning which the plaintiff in error is entitled to a determination by this court.

Green Bay, etc., Canal Co. vs. Patten Paper Co., 172 U. S. 58.

Dewey vs. Des Moines, 173 U. S. 193.

III.

Attorneys' Fees are Not Recoverable as Damages Upon Injunction Bond Given in Federal Court.

SPECIFICATIONS OF ERROR III, IV AND V.

The allowance of attorneys' fees as an element of damage recoverable upon an injunction bond has been upheld by the decisions of the courts of last resort in a number of States, including Kansas. The Supreme Courts of other States refuse to allow such damages and the courts of the United States, following the rule and decision of this court have uniformly refused to permit attorneys' fees to be proved and recovered in an action upon an injunction bond. In several of the Circuit Courts of the United States this rule by analogy has been made applicable also to appeal bonds operating as a supersedeas and attachment bonds.

The enunciations of this court upon this subject are clear and distinct.

See:

Arcambel vs. Wiseman, 3 Dallas 306.

Bein vs. Heath, 12 How. 168.

Oelrichs vs. Spain, 15 Wall. 230.

Russell vs. Farley, 105 U. S. 433.

This rule, as stated in *Bein vs. Heath*, is also quoted approvingly by this court in *Meyers vs. Block*, 120 U. S. 208. It has also been followed in the following Circuit Court decisions:

Browning vs. Porter, 12 Fed. 460; 2d McCrary, 582.

The Alice, 12 Fed. 502.

Jacobus vs. Monongahela Bank, 35 Fed. 396.

Fidelity Ins. Co. vs. Roanoke Iron Co., 91 Fed. 21.

The following State courts have also expressly adopted and followed *Oelrichs vs. Spain*, as stating the correct principle for guidance in that behalf:

Oliphant vs. Mansfield, 36 Ark. 195.

Dorris vs. Miller, 105 Iowa, 569; 75 N. W. 483.

Thurston vs. Haskell, 81 Me. 306; 17 Atl. 74.

Wood vs. State, 66 Md. 68; 5 Atl. 479.

Frost vs. Jordan, 37 Minn. 546; 36 N. W. 714.

Hill vs. Thomas, 19 S. C. 236.

Loeb vs. Mann, 39 S. C. 470; 18 S. E. 2.

Stringfield vs. Hirsch, 94 Tenn. 432; 29 S. W. 611.

Galveston, etc., R. R. Co. vs. Ware, 74 Tex. 50; 11 S. W. 920.

Jones vs. Rosedale, 75 Tex. 383; 12 S. W. 998.

There are a number of other State courts which have refused to allow attorneys' fees to be recovered as damages on an injunction bond, but the foregoing cases we cite principally because they follow and adopt the reasoning of *Oelrichs vs. Spain*, and fully recognize it as the authority of this court and as settling the rule in the Federal courts. The paucity of cases of the character of this one coming to the knowledge of the Federal court is ascribable to the fact that it is universally recognized by the courts and by the bar as the settled rule in Federal courts, and having been once established so firmly and clearly there has been no judicial necessity for reasserting it.

That the reasoning of the learned judge who delivered the opinion in *Oelrichs vs. Spain*, is sound, on broad principle, and meets the approba-

tion of careful jurists appears in the recent case of *Stringfield vs. Hirsch*, above cited, which case, like this, turns largely, if not entirely, upon this one question. This is a frank and full discussion of the whole subject in the light of the present state of the law, giving weight to judicial reasoning both pro and con upon the question. The court says:

"The first and most important question presented is, are counsel fees proper elements of damage in cases where attachments and injunctions are wrongfully sued out, and impounding orders wrongfully obtained? Upon this question there is abundance of authority, and an irreconcilable conflict of decisions in the courts of the several States and the Federal courts. In High on Injunctions it is held (sec. 1685) that according to the great weight of authority, reasonable counsel fees incurred in procuring the dissolution of an injunction are a proper element of damages; the amount being limited to the fees paid for procuring the dissolution, and not for the general defense of the case. This holding proceeds upon the idea that the defendant has been compelled to employ counsel to rid himself of an unjust restriction which the plaintiff has placed upon him, and hence such fees will only be allowed when motion is made to dissolve pending the litigation, and before the hearing on the merits, sec. 1686. Again, fees will not be allowed to cover the entire expense of the defense, but only for such as was incurred about the injunction. High, Inj., secs. 1688, 1690. See, also, 1 Sedg. Dam., sec. 257; 1 Suth. Dam., sec. 85; 2 Sedg. Dam., secs. 524,

525; Beach, Inj., secs. 203, 210. In these text books the principal authorities pro and con are cited and collated. A well-considered case holding the majority view is *Cook vs. Chapman*, 41 N. J. Eq. 152; 2 Atl. 286. This rule thus stated, with minor modifications, is laid down in some 26 States of the Union; among them the following: Alabama, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, Virginia, West Virginia. In some of these States the matter is regulated by statute, as in Iowa, Mississippi, Washington State. But the rule is held otherwise in Arkansas, Maryland, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, and is settled by neither statute nor decision in Connecticut, Massachusetts, North Dakota, Rhode Island, so far as we have been able to ascertain. In the United States Supreme Court and in the Federal courts, such fees are not allowed. The case of *Oelrichs vs. Spain*, 15 Wall. 211, sets forth the holding of the Supreme Court of the United States in a case very similar to the one at bar. . . .

It is insisted that the cases of *Davenport vs. Harbert*, 1 Leg. Rep. 173, and *Oelrichs vs. Spain*, 15 Wall. 211, are not exactly similar to the case at bar, inasmuch as they do not show that the fees claimed in those cases were properly fees incurred about the injunctions alone, and not in the general defense of the cases, and this criticism is just, so far as we can see from the meager reports of these cases; but at last the question, if not settled by these cases on analogies, is one of broad public policy, and should be settled in accordance with the general trend of our decisions

in similar cases, and with the wisest public policy. It is difficult to see upon what ground counsel fees incurred by the adverse party should be charged up to the defeated party any more in attachment and injunction cases than in other litigations, upon contracts or for damages for torts. The litigation may be equally unjust and oppressive in other cases, as in the case of attachments and injunctions. It is true, the latter cases are in some respects more summary, and may entail damages arising out of the seizure of defendant's property, but all this is provided for by the terms of the bond required to cover damages sustained. But counsel fees are as necessary in the one class of cases as in the other, and are neither peculiar nor more onerous in cases of attachments and injunctions than in other cases. It is said that additional fees are required to remove the attachment and injunction, and relieve from the impounding orders; but this is more imaginary than real, as the attention necessary to protect and guard against the injunction or attachment is in a vast majority, if not all of the cases, merely incidental to the defense upon the merits, and it is practically impossible to distinguish between services rendered about the attachment or injunction and those about the defense of the case generally. Any apportionment of the fees between these different services is more or less arbitrary and fanciful. But, if it were otherwise, it is at last but counsel fees of the opposite party which his adversary is called upon to pay.

It is said that in attachment and injunction cases a bond is required, the conditions of which are to pay all such damages as occur by the wrongful suing out of the writs, and that this creates, virtually, a contract on the part of the defendant to pay such damages. But we think that this is a

mistaken view of the office and reason of the bond. The liability for damages for wrongfully suing would be the same, so far as the principle in the bond is concerned, whether the bond were executed or not; and the office of the bond is not to create or regulate the liability of the pincipal, but to bring in the bondsmen, as the securities of the principal, to answer for such damages as are proper. While the liability of the sureties arises out of the execution and condition of the bond, the liability of the principal in no wise depends upon the bond or its conditions. We think that the analogies of the law, as well as the soundest public policy, demand that counsel fees in suits upon contracts, or for damages for torts, or upon attachments or injunctions, should not be regarded as a proper element of damages, even where they are capable of being apportioned so as to show the amount incurred for the attachments and injunctions as separate and distinct from the other services necessary in the case. It is not sound public policy to place a penalty on the right to litigate; that the defeated party must pay the fees of counsel for his successful opponent in any case, and especially since it throws wide the doors of temptation for the opposing party and his counsel to swell the fees to undue proportions, and, in cases of attachment and injunction, to apportion them arbitrarily between the fees pertaining properly to the attachment and injunction and those relating to the merits of the case."

An examination, if the court should deem it necessary to make such an excursion of the authorities allowing counsel fees, will disclose that they rest, not upon any sound or well reasoned exposition of public policy, but are largely redup-

licated by mere application of the rule of *stare decisis.*

The Case at Bar is a Signal Illustration of the Wisdom of the Rule in Oelrichs vs. Spain.

The temptation adverted to by the learned justice in the Tennessee case overcame the plaintiff in the case at bar and an examination of the record will disclose that he saddled upon the surety on this injunction bond substantially all of the fees of all of the counsel for all of the defendants for this entire litigation. It will be noted from the record that all of this congress of attorneys who appeared for Mulvane and the other defendants in the case, with one exception, namely, Silas B. Jones, presented large individual bills varying from three thousand to six thousand dollars each, and aggregating over twenty thousand dollars, which Mulvane paid and immediately charged against the surety upon this injunction bond.

The record discloses that with one exception all of these lawyers appeared and represented all of the defendants, including Mulvane, in an unsuccessful resistance of the application for a tempo-

rary injunction which was granted by Judge Foster. It is also shown that they filed pleadings in the case for all of the defendants including answers to the merits and pleas for want of jurisdiction; and further, that they appeared for all of the defendants in various motions which were filed to vacate and set aside the temporary injunction, and that they all appeared and were present and assisted in the argument and in obtaining the order which was finally made by Judge Caldwell at Little Rock, dissolving the temporary injunction, which order was made upon the motion of Coffin & Stanton in the case.

It appears, therefore, without contradiction and cannot be gainsaid that these attorneys performed services in respect to at least two branches of the case which, under all authority, even in those States in which attorney's fees may be recovered, form no element of such recovery; namely, first, in an unsuccessful opposition to the granting of the temporary injunction.

Sedgwick on Damages, 488.

Riddle vs. Cheadle, 25. O. St. 278.

Mitchell vs. Hawley, 79 Cal. 301; 21 Pac. 833.

Curtiss vs. Bachman, 110 Cal. 433; 42 Pac. 911.

Sweet vs. Mowry, 71 Hun. 381.

Whiteside vs. Noyac Cottage Ass'n, 84 Hun. 555.

And second, services rendered in the case upon its merits, fees for which cannot be recovered.

Mitchell vs. Hawley, 79 Cal. 301; 21 Pac. 833.

Randall vs. Carpenter, 88 N. Y. 293.

Creek vs. McManus, 17 Mont. 445; 43 Pac. 497.

Riddle vs. Cheadle, 25. O. St. 278.

Lawrence vs. Trainer, 136 Ill. 474; 27 N. E. 197.

Lambert vs. Alcorn, 144 Ill. 313; 33 N. E. 54.

Tabor vs. Clark, 15 Colo. 434; 25 Pac. 181.

Donahue vs. Johnson, 9 Wash. 187; 37 Pac. 322.

High on Inj., sec. 1685.

2d Suth. on Dam. 64.

This is for the reason, as stated by the Supreme Court of California in *Mitchell vs. Hawley*, *supra*, that the allowance of attorneys' fees is exceptional and should not be carried beyond the point to which former decisions have taken it.

In brief, then, these attorneys presented a charge in gross which necessarily included the

following three elements of valuable services for which Mulvane was entitled to no recoupment: First, for services in resisting the application for a temporary injunction. Second, for services upon the merits of the cause; and third, for services on behalf of the other defendants to the cause, including the dissolution of the injunction; all liability for which had been released by such other defendants by the stipulation set forth in the statement of this case.

It becomes interesting to inquire upon what theory the Supreme Court of Kansas permitted this recovery, beyond all rule and precedent. The entire subject is brushed aside by the Supreme Court with the single statement that the plaintiff in error is mistaken as to the facts. In answer to this it is only necessary to cite this court to the pages of the record which establish these facts and challenge our adversaries to produce a scintilla of evidence to show the contrary.

See pages 107 to 123 of the record, establishing that these attorneys appeared in resisting the temporary injunction and services performed.

Pages 125, 129, 130, 136, 144, 146, 149, 151 and 165, setting forth various appearances, answers and pleas of the defendants, and applica-

tion of Woodbury & Moulton to be made parties defendant, and argument before court thereon and denial of same, being services performed upon the merits of the cause.

Testimony of A. A. Hurd, pages 56 and 57; of Eugene Hagan, pages 79, 82 and 83, and of J. D. McFarland, page 85, to the effect that they performed services for defendants other than Mulvane, including services going to the merits of the case; that their entire bill was paid by Mulvane in gross and without any separation or apportionment as to the several defendants or to the several branches of the litigation concerning which the services were rendered.

To the first objection, namely, the inclusion of services prior to the temporary injunction, no attempt even was made by the defendant in error to explain or excuse. In answer to the objection of including the value of services upon the merits of the cause, it is argued that it became necessary to perform these services upon the merits in order to accomplish a dissolution of the injunction. So far from this argument aiding the contention of the defendant in error, it completely disproves his right to any attorneys' fees, because, if they were incapable of separation no attorneys' fees

could be allowed, under all of the authorities which sustain this element of damages. The burden lay upon the plaintiff to apportion his attorneys' fees and to establish the value of those services restricted and limited to a successful effort to dissolve the injunction. It was not for the defendant to make this proof and it is no answer for the plaintiff to say that it is incapable of proof. No authority excepts from the operation of this general rule cases where other services are so commingled that they are incapable of separation, but on the contrary that circumstance renders the entire measure of attorneys' fees irrecoverable.

In answer to the third and last objection, that Mulvane was recovering for services which had been rendered for other defendants in the case, we are met with the assertion that Mulvane was the sole party really interested in this litigation and that he paid the bills and assumed the entire burden of the litigation. The significance of this contention on the part of Mulvane becomes apparent when it will be observed from the stipulation of October 7, 1890, that these other defendants represented by these same attorneys entered into a binding stipulation with the complainants

whereby for a valuable consideration, which they received at the time, they released and discharged this bond from all liability.

By the grace of the complainants in making this stipulation the two water companies were released from this injunction and were permitted to carry out the resolutions of their boards of directors for the issuance and exchange of their bonds and stock, and Messrs. Coffin & Stanton were permitted to acquire possession of the same, and Mr. Mulvane was permitted to carry out his contract with Coffin & Stanton resulting in a very large increase of profit to himself over the contract which he had previously made with Wescott and Hanson. No suggestion was at that time made and no notice given of any sort to the complainant that Mr. Mulvane was the sole party in interest in the suit and that for the services rendered to these water companies and to Coffin & Stanton he made himself chargeable as to counsel fees.

This dilemma, therefore, is presented to Mulvane in this suit; namely, if the two water companies and Coffin & Stanton were mere dummies and represented Mulvane, although appearing to be active parties and participants in the suit, then the stipulation includes Mulvane in its terms so

far as the waiver of damages is concerned. If they were active and real parties in the suit and the services rendered in their behalf have been paid for by Mulvane, then there was no apportionment of the fees or charges relating to the dissolution of the injunction which Mulvane might rightfully personally claim, and therefore none could be recovered.

But apart from all this, it is no answer to say that Mr. Mulvane was solely interested in and assumed the burden of this litigation and therefore is entitled to recover, for the reason that it became necessary for these attorneys of Mulvane to clothe these other defendants with an apparently vital and substantial interest in the controversy which made it necessary for them to file pleadings and to do other things looking to the merits of the case which cannot be recovered for on the bond.

IV.

The Federal Construction of Liability Upon the Bond Binding Upon the State Courts.

It is true, as has been noted by the Kansas Supreme Court, that there is no act of Congress that in express terms authorizes a judge of the

United States Circuit Court to require a bond as preliminary to the issuance of a writ, or which fixes or determines the nature of liability of such a bond. The right to issue a writ of injunction by a Federal judge is referable solely to the constitution and laws of the United States conferring jurisdiction upon such courts. The first section of article III of the constitution confers all the judicial power of the United States upon one Supreme Court and such inferior courts as Congress may from time to time ordain and establish. The second section fixes the jurisdiction of these courts, and among other elements of jurisdiction ordains that the judicial power

> "shall extend to all cases in law and equity . . . between citizens of different States."

The jurisdiction as to the subject-matter of controversies by force of this provision of the constitution is of necessity preserved in all acts of Congress concerning jurisdiction upon the Federal courts. The essential separation and distinction between jurisdiction at law and in equity in cases in the Federal court has been consistently preserved and recognized by repeated decisions of this court. We cite only a few:

Robinson vs. Campbell, 3 Wheat. 212.

Bennett vs. Butterworth, 11 How. 669.

Thompson vs. Railroad Co., 6 Wall. 134.

The conformity act (Rev. St., sec. 914), which makes the practice and pleadings of the court of the State at common law analogous rules for the Federal courts, has nothing whatever to do with the exercise of chancery jurisdiction in the latter tribunals.

See, *Blease vs. Garlinghouse*, 92 U. S. 1.

The equity practice of the United States Circuit Courts is governed by the rules of practice prescribed by the Supreme Court of the United States and by the several Circuit Courts and Circuit Courts of Appeal not inconsistent therewith, and in the absence of such rules, by the practice of the High Court of Chancery in England prevailing when the equity rules were adopted, so far as the same may reasonably be applied.

See:

Equity Rule 90.

Russell vs. Farley, 105 U. S. 437.

A suit for injunction in the Federal court is exclusively of equitable cognizance. The power of the Federal court, therefore, to issue an injunction writ and to exact a bond does not rest upon the statute of any State, but the right to impose

the terms upon which the injunction shall be granted is one of its inherent equitable powers which may not be enlarged, restricted, or in any manner modified or affected by any State legislation or the rule of practice of any State court.

It follows, therefore, that inasmuch as the Federal court derives its power from the constitution and laws of the United States to issue the writ and determine and exact the terms and conditions upon which it shall be issued, it must of necessity have the power of determining the liability upon any injunction bond and to mitigate or absolve the obligors upon such liability. In other words, no vested right accrues to any damages by virtue of the execution of such bond in behalf of any obligee. This view is so aptly and concisely stated by this court in *Russell vs. Farley*, that, for the convenience of the court we place it upon our brief, as follows (p. 442):

"Besides, the power to impose a condition implies the power to relieve from it. If, for example, it is deemed proper, upon an application for an injunction, to require, as a condition of granting or withholding it, that a sum of money should be paid into court, or that a deed or other document should be deposited with the register, and the developments of the case are afterwards such as to make it manifestly unjust to retain the fund or document and deprive the owner of its

use, the court assuredly has the power (though, undoubtedly, to be exercised with caution) to order it to be delivered out to the party. When the pledge is no longer required for the purposes of justice, the court must have the power to release it, and leave the parties to the ordinary remedies given by the law to litigants *inter sese*. . . . On general principles the same reason applies where, instead of a pledge of money or property, a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion, rather than a furtherance, of justice to deny to the court the power to supersede the stipulation imposed."

The Supreme Court of the State of Kansas in the case of *Mulvane vs. Tullock*, (first appeal), uses the following language:

"It [the bond] is not a mere incident of the injunction proceeding, nor can this, which is an ordinary action at law, be regarded as auxiliary to the proceeding in the Federal court. Being an *independent contract*, actionable in any State court where service upon the sureties can be obtained, the interpretation of the forum applies."

This mistaken notion of this bond arises from

the fact that such bonds in Kansas are required by statute, and being so regulated and given, possess all the elements of independent contracts. No injunction under this statute can have any force or effect until the bond is filed and approved as required by the statute. Legal remedies and rights strictly legal may, under the Kansas procedure be commingled in the same action with matters of purely equitable cognizance, and an injunction may issue as an incident to an action at law. The contrary is true in the Federal court, not because it might not be convenient and desirable by litigants, but because under the construction of the constitution of the United States by this court in its decisions, no such power exists in the Federal tribunals.

The power to make rules governing the practice and procedure in equity is conferred by act of Congress upon the Supreme Court of the United States. Inasmuch as the powers of the Circuit Courts of the United States to entertain injunction proceedings are derived from the constitution and the judiciary act, and are in the nature of general equitable powers, the exercise of such powers is in pursuance of such Federal authorities and the courts thereby derive the power to grant an in-

junction without bond, or to dispense with a bond after it has been granted, or by rule to limit and control the liability upon such bond. The Federal courts in this behalf are all-powerful. There is devolved upon them as to the rights of parties under such a proceeding powers that are the exact equivalent in that behalf to the legislative powers of the State.

See, *Russell vs. Farley, ubi supra.*

It was urged, and the court must have decided that we were asking it to dispense with or modify, or overrule the decisions which it had made upon the subject of bonds in State courts. This was a mistaken notion. We were simply asking that the rules established by this court should be applied to the determination of the liability upon this bond. There is, and can be, no conflict of decision when properly considered.

It may be contended that in the absence of a formal rule limiting the liability upon an injunction bond promulgated by this court the State court was free to adopt a rule of its own. But it cannot be successfully contended that a decision of this court limiting and fixing such charges and such liabilities as may be recovered as damages, is of less sanctity and force than a rule in equity.

Further, it would be foreign to the purpose of such rules to embody in them any limitation upon the liability upon bonds.

This very question was before the Supreme Court of the United States in the case of *Bein vs. Heath*, 12 How. 168. A bill had been filed in the Circuit Court of the United States by Mary Bein to enjoin the seizure and sale of property which she claimed to be her separate estate and not charged with the payment of the debt. The bond was of the form in use in the State courts of Louisiana in cases where the law requires an injunction bond to stay execution on a judgment or order of seizure and sale. The condition of the bond was as follows:

"Now, the condition of the above obligation is, that we, the above bounden Mary Bein and Gilbert S. Hawkins and James McMasters, sureties, will well and truly pay to the said Mary Heath, the defendant in said injunction, and plaintiff in said case of seizure and sale, all such damages as she may recover against us in case it should be decided that the said injunction was wrongfully obtained."

The court entered a decree dissolving the injunction and authorizing the respondent to proceed with a writ of seizure and sale, granted in accordance with the prayer of her original petition, and

thereupon suit was brought upon the injunction bond and certain damages were recovered which would be allowable upon bonds of a similar character under the laws of Louisiana, where an injunction was obtained to stay execution upon an order for the seizure and sale of mortgaged property. Under the Louisiana laws the party who obtained an injunction and failed to support it at the trial was subject to have judgment given against him and his sureties for the debt, interest and damages at the time the injunction was dissolved. The sureties on the bond were treated as parties to the suit and the amount of interest and damages which the court might award by its judgment was regulated by the laws of the State.

For our convenience and that of the court, and as part of this argument, we quote liberally from the opinion of the court in this case, as follows:

"It is with reference to this mode of proceeding that the injunction bond in question appears to have been framed; and it is to this judgment, as prescribed by the laws of the State, that the condition must refer when it binds the obligors to pay all such damages the obligee might recover against them, in case it should be decided that the injunction was wrongfully obtained. There must be a recovery; that is, a judgment against them, before the condition is broken, and before any proceeding could be had upon the bond.

Now, there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of the United States, to the laws of the State. The proceeding in a Circuit Court of the United States in equity is regulated by the laws of Congress and the rules of this court made under the authority of an act of Congress. And the ninetieth rule declares that, when not otherwise directed, the practice of the High Court of Chancery in England shall be followed. The eighth rule authorizes the Circuit Court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the court. And if it has it is unauthorized by law, and cannot regulate the rights or obligations of the paries.

And when an injunction is applied for in the Circuit Court of the United States sitting in Louisiana, the court grant it or not, according to the established principles of equity, and not according to the laws and practice of the State in which there is no court of chancery as contradistinguished from a court of common law. And they require a bond, or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

In proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the State. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, *nor for the fees paid to the counsel for conducting the suit.*"

The plaintiff in error as surety upon this bond, has, under familiar principle, a right to rely upon the force of decisions of this court fixing and determining his liability. Such decisions enter into his bond to the same extent as if their purpose and effect were set out in the instrument itself. If the bond had contained a recital of the rules of decision of the Supreme Court at length, exempting the surety from liability for attorneys' fees, it would hardly be contended that such liability would accrue notwithstanding. But being the law under which the court acted which ordered the bond to be executed, the rule of such decisions is as fully a part of the bond by implication as if it were fully set forth therein. Dealing with this as a contract, or even as an independent contract, as the Supreme Court of Kansas did, it was the duty of that court to so construe it as to

determine what was the meaning and the intention of the parties thereto at the time. From the time when *Hadley vs. Baxendale*, 9 Exch. Rep. was decided, continuously by a long line of decisions to the present time, parties to contracts are only liable for such consequences as were the direct result of the breach and were in their contemplation at the time of the formation of the contract. That the sureties were aware of the law announced by this court governing injunction bonds is conclusively presumed. They could not be heard to assert the contrary. Knowing such law, therefore, and the extent of liability they were assuming as limited and fixed by such decision, the sureties cannot be held to have assumed a greater liability.

In the case of *Olcott vs. Supervisor*, 16 Wall. 690, this court said:

"Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If, then, the doctrine asserted in *Whiting vs. Fond du Lac County* is inconsistent with what was the recognized law of the State when the county orders were issued, we are under no obligation to accept it and apply it to this case."

To the same effect, see, *Burgess vs. Seligman*, 107 U. S. 20; *Mix vs. Vail*, 86 Ill. 40.

The rule is obvious that in all cases where the nature of the controversy is such that a writ of error will lie from this court, it should be the duty of the Supreme Court of the State to decide and apply any rule or principle of law *pro hac vice* established by this court. As to all such cases it is equally obvious that the Supreme Court of the State is an inferior court and is bound by the rules and decisions of this court as by paramount law. This would seem too clear to ever have been mooted and decided, but it has been settled in two cases by very respectable authority. In the case of *Belcher vs. Chambers*, 53 Cal. 635, the court held:

"When the question upon which the judgment of this court depends is such as may be re-examined upon writ of error by the Supreme Court of the United States, we will follow the rule of law with respect to such question laid down by the Supreme Court of the United States."

In the case of *San Benito County vs. Southern Pacific R. R. Co.*, 77 Cal. 518, this principle was again enunciated with added emphasis as follows:

"In cases where a writ of error will lie to the Supreme Court of the United States, the decisions of that court will be followed in this court in preference to former decisions of this court."

The United States Circuit Court in the principal

case out of which this bond grew (namely, the case of *Wescott and Hanson vs. Mulvane et al.*) did that which, as already shown, could not have been done in the State court; namely, it accepted a cash deposit as security for the damages that might be suffered if it should finally be held that the injunction was wrongfully granted. Now, assuming that nothing more than to put up this money had been done, how much of such money of the principals of the bond who put it up would or could have been taken by the Federal court or allowed to be taken by that court in satisfaction of damages.

Assuming that the case had gone to its conclusion and the injunction had been dissolved, and the United States Circuit Court for Kansas had remitted Mulvane to his action at law for damages, such action might have been prosecuted in the State as well as in the Federal court, but any judgment which should be rendered in such action must of necessity have been satisfied out of the funds in the custody of the United States Circuit Court. Can it be conceived that a judgment obtained in the State court and sought to be enforced against such fund upon an element of liability forbidden by a decision of the Supreme

Court of the United States, would have had the sanction of the Federal court, or, if prosecuted in the Federal court subsequently against the fund, would have been upheld by this court? Certainly, the control of the Federal court over this fund was exclusive, and if the obligees who claimed to be damnified had gone in and asked the court to assess their damages, it could not have allowed them a penny for attorneys' fees, and the fund would not have been diminished one cent by such allowance. But the sureties upon this bond stepped in and did what? They took the place of the $75,000 deposit. Can it be contended for one moment that they assumed or could be held to have assumed any higher or greater liability for damages than might have been assessed against and collected from this fund? The significance of this situation is all the greater when the court shall recall that the bond in this case upon which this suit was brought was not given until long after the liability, if any, had accrued which was chargeable upon this fund in court; in other words, the bond was not given or the fund withdrawn from the court until one month after the injunction had been dissolved. There is no escaping the proposition that the bond

was intended by all parties as a mere substitute for the fund in court.

Under the decision of *Russell vs. Farley, supra*, and other cases which we have cited, Mulvane could have gone into the Federal court in the case in which the bond was given and have asked the court to make the necessary order to subject not only the sureties but the principals to the payment of damages. Under these circumstances the principals would not have been compelled to pay attorneys' fees.

This presents the anomaly, not to say the judicial outrage, that there is one and a very much greater liability for the sureties and another and very much less one for the principals upon this bond. To illustrate this point further, the record in the present case shows that the sureties alone upon this bond were sued and service was obtained only upon Tullock. Tullock is and was at the time of the institution of the suit a citizen of the State of Kansas. The defendant in error being likewise a citizen of the State, brought suit in the State court to obtain jurisdiction of Tullock. Tullock had a right to assume in remaining in the State court that the State court in dealing with a bond of this character would fix

his liability according to the rules and decisions of the Supreme Court of the United States, and would not visit or impose upon him a liability greater than that which might be imposed upon his principal who might have been proceeded against summarily without the service of process in the Federal court in the cause in which the injunction was granted. He had an election, therefore, to stay in the State court or to remove. That election might be governed by the relative expensiveness of litigation in the one or the other tribunal. But it was not thinkable that a rule of decision in the State court might be made to serve the purpose of a heavy penalty for his remaining therein and his failure to remove into the Federal court.

The question involved in this branch of our argument was one of first impression in Kansas at the time this case was presented. By reference to the opinion of the court upon the first appeal (*Mulvane vs. Tullock*, 58 Kan. *ubi supra*) certain decisions of State courts were presented by counsel and adopted by the Kansas court as upholding its view. These cases were few in number. An examination of the authorities we think will satisfy this court completely that this

question, namely, the right of a State court to independently determine the liability of a surety upon an injunction bond given in a case in the Federal court and to abrogate and set aside the rule of decision as to such liability of this court, *quo ad hoc*, has never yet fairly been presented to any State Supreme Court or fully and fairly considered and decided, and is still, so far as State courts are concerned, a question undetermined and at large, except in this case and in the decision of the Supreme Court of the State of Kansas therein.

We will first briefly examine the case of *Mitchell vs. Huzley*, 79 Cal. 301. This case, we have cited as an authority very strongly in our favor against the contentions of defendant in error upon another branch of this argument; but in so far as it assumes to determine the question now under consideration, although such question was mooted in the case, it is not authority, and the language of the court in that respect is *obiter dictum*. By reference to the case it will be seen that the court finally decided against the allowance of attorneys' fees upon other grounds, and therefore it was not necessary for the court to determine the question as to the right of its independent

judgment against the authority of *Oelrichs vs. Spain*. The Federal question as presented in the case was in the alternative; that is, it was contended that attorneys' fees were not recoverable, because not apportioned; but if the court should hold that they were apportioned and were recoverable, then the rule of the Federal court precluded their recovery. The court held the first proposition in favor of the defendant in error in that case and therefore had no occasion to decide the other question, and its determination may not be drawn into precedent. An examination of this case, too, will show that no briefs of counsel are printed and none of the Federal authorities which we have heretofore cited was discussed or passed upon. So far as the record goes, there was no fair or full presentation of the question to the court. No authorities in support of the *dictum* are cited by the court and no opposing authorities seem to have been considered. The reason given for its view by the Supreme Court of California, in the light of the authorities which we have already cited to the court, do not commend themselves to the judgment. The reasons given are that the sureties could not know that they would be sued in the Federal court and by reason of citizenship

might not be sued at all in that court, which is begging the whole question here presented and clearly avoiding its decision.

The two cases in the Missouri Court of Appeals which are referred to by the Supreme Court of Kansas are of an inferior court of Missouri, which, under section 12 of article 6 of the constitution of the State of Missouri, forbids the Missouri Court of Appeals making a final decision upon this question. An examination of those cases shows that the Federal authorities upon this subject were neither cited not examined by the court rendering the decision and the cases embodied in the opinion as supporting the view of the court in this behalf upon examination will be found to have no relevancy to the question here under discussion.

The case of *Corcoran vs. Judson*, 24 N. Y. 106, cited by the Supreme Court of Kansas in its opinion in support of its view, will be found upon examination to be an action upon an injunction bond, given, it is true, in the Federal court, upon which counsel fees were allowed as damages, but concerning the allowance of which no objection was made and no question raised by the parties to the suit, and the question here propounded was neither mooted nor considered.

That the Kansas court failed to justly discriminate and understand the cases that were cited is forcibly illustrated in its commentary upon the case of *Meyers vs. Block* as follows:

"Attention has been called to *Meyers vs. Block*, (120 U. S. 207,) cited as an authority in behalf of defendant, which was a case from Louisiana. The Supreme Court of Louisiana allows attorneys' fees as damages upon an injunction bond given in a Federal court, and in *Meyers vs. Block* the judgment of that court was affirmed by the Supreme Court of the United States. The report of the case does not clearly show the damages sought to be recovered in the case, or that attorneys' fees were involved. In the late case of *Aiken vs. Leathers, supra*, in referring to the cases taken from that State to the Supreme Court of the United States, the court says:

'Now, a reference to the records of those cases shows that counsel fees were an element of damages in the demand as well as in the proof. Hence, we feel authorized to conclude that the decisions which we have considered and consulted are not to be construed as excluding counsel fees as an element of damages in an action at law in a Federal court, and *a fortiori* in a Louisiana court, for the recovery of damages on a bond of injunction given in and by the order of a Federal court in an equity proceeding.' "

The case of *Meyers vs. Block* will be examined in vain to find any allusion whatever to attorneys' fees or that any question of attorneys' fees ever arose in the case or was brought to the attention

of this court. We cited it in our brief before the Supreme Court of Kansas, as we have cited it here, for the single purpose of showing that an injunction bond given in the Federal court and under the order of such court involve a Federal question, which would be reviewed in all its scope by this court upon writ of error.

The quotation from the opinion above quoted also shows the sedulous effort made by the Kansas court to avoid the force of the plain rule forbidding attorneys' fees upon Federal injunction bonds. An examination of the authorities referred to by the Kansas court will illustrate the instability, if not the unfairness, of the position taken upon the strength of those cases.

The case of *David Block vs. Meyers & Levi* was a simple action instituted in the State court upon an injunction bond exacted in a bankruptcy proceeding by order of the United States District Court. There were but four questions presented for decision of the State court in the suit upon this bond. The opinion and entire decision do not occupy exceeding a full page of the report in 35 La. Ann., p. 220, and the court there decided, first, that the bond was given in substantial compliance with the order of the court. Second, that

such bond was actionable against the sureties without preliminary suit against the principals or proving that its conditions had been broken. Third, that the bond under the circumstances in which it was given covered damages previously accrued, as well as those which arose after its execution. Fourth, that in a suit upon such bond malice could neither be pleaded nor proven. This is all the record of the case which can be found by the most diligent search of the records and reports of the Supreme Court of Louisiana, unless, perchance, one should take the trouble to make an excursion through some pleadings or transcript of testimony which were not embodied in any of the published reports.

And the court in *Aiken vs. Leathers*, as will be observed, did not declare that the question of granting attorneys' fees was controverted, or even that attorneys' fees were allowed, but simply limits its statement to the assertion that attorneys' fees were "an element of damage" in the case.

Meyers sued out a writ of error in this court to the Supreme Court of Louisiana in the case of *Block vs. Meyers & Levi*. The only specifications of error submitted to this court are to be found on page 209 of 120 U. S. and are as follows:

"First. The Supreme Court of Louisiana erred in subjecting the plaintiffs in error to the law and jurisprudence of Louisiana, when they were parties to an injunction bond given in equity in and by order of the Federal court.

Second. The Supreme Court of Louisiana erred in holding that the bond was regular.

Third. The Supreme Court of Louisiana erred in holding that an action could be maintained on the bond in suit before its condition was broken.

Fourth. The Supreme Court of Louisiana erred in holding that the bond in suit, construed with the order requiring it, could cover and bind the obligors for damages which had been sustained before it was given."

It will be observed, however, that the court examined the entire record and passed upon every question connected with the case and thereby asserted its right to review in toto the case as one presenting a Federal question. That no question of attorneys' fees was before this court or even mooted in argument, may be found by a careful consideration of the whole case itself; but if the case has any significance upon this point it is to affirm the doctrine of *Oelrichs vs. Spain*, because this court, in the case of *Meyers vs. Block*, quotes approvingly the language of the case of *Bein vs. Heath*, as follows:

"They [the obligors of the bond] would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost

by the delay, *nor for the fees paid to the counsel for conducting the suit.*"

We conclude, therefore, by asserting that with the exception of the Kansas Supreme Court in this case, no decision of any Supreme Court can be found, save the *dictum* in the California case above referred to, where, upon challenge, full faith and credit has not been given to the rules and decisions of this court in this behalf.

V.

The Condition Upon Which the Liability of This Bond Depended Never Happened by Reason of the Affirmative Act of the Parties in Entering Into the Stipulation Appearing Upon Page 175 of the Record. See Specifications of Error Nos. VI and VII.

This bond, being one issued by a judge of the Federal court in a cause depending in that court in chancery and in pursuance of its equitable powers, we contend that all of the incidents of the bond and all measure of liability upon it are matters of Federal cognizance and are subject to the review and determination of this court. We therefore insist that the court erred in overruling

the assignment of error which we made in the court below and which we have renewed here, being specifications of error Nos. VI and VII of our brief.

In the petition or complaint in the trial court the breach assigned of the bond conforms to the language of the bond, and is as follows (p. 8):

"Plaintiff further alleges that such further proceedings were had in the said suit pending in the Circuit Court of the United States for the District of Kansas, that it was finally decided that the said temporary injunction was unlawfully issued and that the said complainants were not entitled to the said injunction."

The proof which was adduced to sustain this averment was the stipulation of October 7, 1890, hereinbefore set out. An objection to this evidence was interposed for the reason, among others, that it was a clear variance from the allegations of the petition (p. 11), and that it did not establish in any event a right of action upon the bond. The Kansas Supreme Court has held in *Brown vs. Galena Mining Co.*, 32 Kan. 528, that a suit upon the bond is maintainable either after the final determination of the case in favor of the defendant or upon a voluntary dismissal by the plaintiff, but it has not decided that the two are interchangeable terms. While the cause of action may accrue

upon either contingency, they are none the less distinct contingencies and distinct grounds of action. Proof of nonsuit is not proof of a final judgment, and an allegation of the one does not warrant proof of the other.

However, defendant in error's entire theory was predicated upon the legal effect of this stipulation of October 7, 1890, and he requested the court upon the trial to instruct the jury as follows (p. 267):

"The jury are instructed that the action of the United States Circuit Court for the District of Kansas in dissolving the temporary injunction in the case of *Wescott and Hanson vs. Joab Mulvane et al.*, above referred to, was made final by the voluntary withdrawal by complainants in that case, on the 7th day of October, 1890, of so much of their bill as sought a specific performance of the alleged contract, and that thereafter the said Joab Mulvane had the right to maintain a suit upon said injunction bond to recover whatever damages he might be entitled to thereunder."

The court refused to give the instruction as tendered, but referred to the jury the legal effect of this stipulation, and whether or not it did constitute in law an abandonment of plaintiff's bill for an injunction, so that thereafter a suit might be brought for damages by Mulvane. (See instruc-

tion No. 5, p. 272.) The jury doubtless resolved this proposition of law in favor of the plaintiff.

In order to uphold this verdict, it must appear not only that the court, at the time and in the manner referred to, had the right and power to pass upon this proposition, but also that it arrived at a correct conclusion; because at the time of the bringing of this suit there had been no final determination of the cause as we shall hereafter argue, and the plaintiff could therefore only proceed by proving that the bill for an injunction had been voluntarily abandoned and dismissed.

Was the stipulation and order made pursuant thereto of a character to confer such right of action and did it meet the terms of the bond in that behalf? The court will bear in mind that this injunction went upon a cash deposit. No bond for any sum of money was given at the time, but the deposit remained until after the circuit judge had entered the order dissolving the injunction on April 4. At the time the bond was executed, therefore, the injunction had been granted and had been dissolved. What can be said, under the circumstances and with that condition of the record, to have been within the contemplation of the surety at the time he made his bond? The court cannot presume that Tullock,

in going security upon this undertaking, believed that he was assuming a liability which had fully accrued and was no longer contingent in its character. With an order dissolving the injunction already made in the case, he must have known that this liability could be avoided only by obtaining an ultimate decision in the case sustaining the rightfulness of Judge Foster's order in awarding the injunction originally. He must necessarily have contemplated a prosecution of this suit and the reversal of the order of dissolution which had been made and the reinstating of the injunction. The bond was given, not to discharge and satisfy a liability already accrued, but to protect and save the complainants harmless from such liability, and this is made clear by the full recitals in the bond itself, and the exact and precise specification of the nature and extent of the liability assumed and the contingencies upon which it should be made to depend. Under the most extreme construction the surety cannot be said to have contemplated further than that the plaintiff should, of his own motion, voluntarily and without beneficial agreement with any other party to the cause, abate the proceeding. It could never have entered his mind in this state of the record, with this liability stand-

ing as it did, that the complainants and the defendants should get together and agree upon a settlement under the terms of which the bill for an injunction should be withdrawn and the very purpose which animated his executing the undertaking frustrated. Can a settlement made under such circumstances as these be said to meet either the letter or the spirit of this bond and the contingency under which a liability should accrue? In this particular case Mr. Mulvane undertakes to testify that he alone was the party who was vitally interested as a defendant; that the defendants other than he were mere men of straw, and that he assumed the entire burden of defense in paying for all of the counsel in the case, and that whatever was done ostensibly on behalf of the other defendants, was in reality and in fact done for and on behalf of Mulvane (see Mulvane's testimony). If this be so, of course then the stipulation which was signed by Mulvane's attorneys for these other defendants must be of necessity his stipulation. If these parties were the mere agents of Mulvane, and if the attorneys who represented them were *pro hac vice* his attorneys, then the release and stipulation in the case was by the acquiescence and agreement of all of the parties

to it effectual and forever annulled the liability of this defendant upon the injunction bond.

But be that as it may, if the court can hold that this stipulation had the effect contended for by the plaintiff and that Mulvane's right to damages was saved, then we insist that its practical effect was to render impossible of occurrence the contingency upon which the liability of the surety was made to depend. The law contemplated, as Tullock had a right to contemplate, that this case would be maintained in the condition it was at the time the bond was made until the subject out of which the bond grew, namely, the rightfulness of the issuance of the injunction, should be "*finally decided*;" that there should be, at least so far as the parties to the suit were concerned, a continuing effort to have such determination made and reached. The surety could not be held to have anticipated that afterwards the parties by stipulation would in effect change this suit from an equitable action for specific performance with injunction as an incident, to an ordinary suit at law for damages, and thereby make it impossible to have the determination of the fact upon which the liability of the sureties was predicated. The Circuit Court of Appeals decided, as did the Supreme Court of

Kansas, that the effect of this stipulation withdrawing so much of the suit as asked for a specific performance of necessity carried with it the injunction, and therefore the court could not review the action of the court below and could not decide whether the injunction was rightfully or wrongfully granted in the first instance. The practical effect of the action of these parties was to dismiss the bill, and this having been done by agreement of both parties, it relieved the surety from any liability upon the bond.

A case in point is *Palmer vs. Foley*, 71 N. Y. 106, a part of the syllabus of which is as follows:

"There is no breach of the condition of the statutory undertaking unless the court finally decides that plaintiff was not entitled to the injunction, or unless something occurs equivalent to such a decision.

A temporary injunction order was granted herein restraining defendant from intruding into the office of deputy chamberlain of New York City, or performing any of its functions, or exercising its powers; the order was subsequently modified by the court by allowing the defendant to institute legal proceedings to test his claim to the office. Under an act of the Legislature, passed during the pendency of the action, plaintiff was deposed from the office of chamberlain, which he held at its commencement. Leave was granted defendant to put in a supplemental answer, setting up the statute and plaintiff's removal thereunder, and to plaintiff to discontinue, in ten days

thereafter, on payment of costs. Plaintiff did not discontinue within the time specified; but thereafter, on stipulation of the parties, and on payment of $100, an order of discontinuance was entered. *Held*, that this was not equivalent to a final decision of the court that plaintiff was not entitled to the injunction order when it was granted; that there was no breach of the condition of the undertaking and no right of action thereon; and that, therefore, an order directing a reference to ascertain defendant's damages, sustained by reason of the injunction, was improperly granted."

On page 109 the court said:

"It follows that the reliance of the defendant is upon the bond or undertaking given by sureties and then he has no greater or other reliance than is afforded by the terms of the instrument which they have executed. Sureties can be held no further or otherwise than they have agreed. (*Drummond vs. Husson*, 14 N. Y. 60.) . . . The action was never finally determined by judicial decision. By amicable and voluntary agreement of the parties, it was discontinued on the plaintiff paying $100 costs to the defendant and, by consent of parties, a special term order was made carrying that agreement into effect and the action thus came to an end. It is claimed that this is equivalent to the court finally deciding that the plaintiff was not entitled to the injunction order. Cases are cited which almost hold to that effect. I will not name them. In most of them there was some action of the court upon the validity or merit of the injunction order adverse to the plaintiff's right to have had it allowed. The plaintiff after such action discontinued of his own motion and presumably in consequence thereof. In none of them was the discontinuance

a matter of agreement between the parties to the action."

To the same effect, see, *Johnson vs. Elwood*, 82 N. Y. 362, the syllabus of which is as follows:

"Where a temporary injunction, restraining defendant from entering certain land, was dissolved by stipulation, and afterwards he died, and on motion of administratrix to compel plaintiff to elect whether he would discontinue or proceed against her, he discontinued: *Held*, that an order of reference to ascertain damages by reason of the injunction could not be granted, as the action abated upon defendant's death, before trial, and the cause of action did not survive.

Held, also, that there was no breach of the undertaking which provided for the payment of damages in case the court should finally decide that plaintiff was not entitled to the injunction, as there had been no such decision."

Also, see, *Tyler Min Co. et al. vs. Last Chance Min. Co.*, 32 C. C. A. 498; 90 Fed. 15, the second paragraph of the syllabus of which is as follows:

"Under the rule that the liability of a surety cannot be extended by implication beyond the express terms of his contract, sureties on a bond given to procure a restraining order, which order required the defendants to cease working a certain portion of a mine, and to refrain from removing or appropriating ore previously taken therefrom, cannot be held liable for damages accruing to defendants after a subsequent order which continued such restraining order in force, but modi-

fied and changed it by permitting the working of the mine, and the disposition of the ore taken therefrom, under regulations prescribed by the court."

The following are also a few of the pointed decisions:

"The dismissal of a bill in equity by agreement of parties, after injunction had issued, is not such a final determination that the injunction was wrongfully issued as fixes the liability of the sureties on the injunction bond."

Large vs. Steer, 121 Pa. St. 30; 15 Atl. 490.

"No action can be maintained on an injunction undertaking, except in accordance with its terms, and this is true with respect to the principal as well as the sureties.

Where in a suit for specific relief, a temporary injunction is allowed on the giving of an undertaking as required by statute and subsequently the parties submit the issues of law and fact in the case to arbitrators selected by themselves, and bind themselves to abide the award (it being in no way made subject to the approval of the court) and the arbitrators make an award in pursuance of the submission that the plaintiff is not entitled to the relief asked in his petition, and award that he dismiss his action, and afterwards the action is so dismissed by consent of the parties and the injunction dissolved, such award is not a judicial determination that the injunction ought not to have been granted and will not support an action on the undertaking; nor will such dismissal by consent estop the defendants from making such defense."

Col., etc., Ry. Co. vs. Burke, 54 O. St. 98; 43 N. E. 282.

An effort may be made in the case at bar to distinguish this case from the authorities upon the ground that the stipulation contains what might be called a reservation of any rights which Mulvane had upon the bond. But in the case just cited it was attempted to dismiss the case without prejudice to the rights of the parties, but the court said:

"It is true that the dismissal was without prejudice, but this was not a controlling circumstance. It was not a part of the *ratio decidendi*. The reason of the decision is that considering the ground of this dismissal it was not determined thereby that the injunction ought not to have been granted."

And so, in the case at bar, having voluntarily interposed an obstacle which effectually prevented a court thereafter from "finally deciding that the temporary injunction ought not to have been granted," the condition for the breach became impossible of occurrence and the sureties have been released from all liability.

Also, see, in this connection sections 1638, 1639, 1640 and 1641, High on Injunctions, 3d ed., 2d vol.

Mr. Beach, in his more recent work on Injunctions, says (sec. 227):

"The liability of a surety on an injunction bond must be strictly construed, and he cannot be held liable beyond the precise terms of his undertaking. Thus, where the undertaking was that the sureties would pay defendants such damages 'as they may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled thereto,' it was held that a dismissal of the action and dissolution of the injunction for a cause arising subsequent to the commencement of the action and not related to the merits, was not a determination by the court that the plaintiff at the time the temporary injunction was granted 'was not entitled thereto' so as to render the sureties liable."

Citing, *Apollinaris Co. vs. Venable*, 136 N.Y. 46.

And a number of the other cases that we have already cited in this brief.

Again, in section 230, Mr. Beach states the law derived from the cases cited to be as follows:

"A surety's liability cannot be extended by the stipulation of the parties to the injunction suit, nor be changed by a statute which goes into effect subsequent to the execution of the bond by the surety. (Citing, *Mix vs. Vail, supra.*) The dismissal of the bill by agreement of parties or their counsel after preliminary injunction has issued, is not such a final determination that the injunction was wrongfully issued as fixes the liability of the sureties on the injunction; for otherwise their liability could be fixed by the agreement

of parties without their assent or even their knowledge instead of the decree of the court, as contemplated and tacitly understood when they signed the bond. This was the conclusion reached in Pennsylvania in 1888 on principle, where the question was then a novel one."

See, also, *Tozzle vs. Leacox*, 59 Ia. 42.

It is contended by the plaintiff in error not only that the stipulation estopped Mulvane from claiming damages, but that his suit was prematurely brought. In all these cases the distinction is clearly made between a voluntary dismissal of an injunction suit by the plaintiff, unaffected by any agreement with the defendant or any stipulation proceeding upon consideration to the defendant, and a state of facts such as exists here. It will be borne in mind that the Circuit Court of Appeals in finally determining this cause held that the effect of the stipulation was to prevent the obtaining of a review of the ruling and order of the court dissolving the injunction. It will also be remembered that by this stipulation Mulvane succeeded in obtaining the dismissal of the suit as to the two water companies, of which he was president and which he said were practically his own because he owned and controlled all the stock in them. He also accomplished an immediate

adjustment of his contract and agreement with Coffin & Stanton. He, of all parties to the suit, reaped the advantage and benefit of that stipulation.

As will be seen by reference to the case of *Tullock vs. Mulvane*, 61 Kan. 658, the court put language into our brief and into our mouths that we did not use—or intend; namely, that because complainants had voluntarily dismissed the injunction suit no damages could be recovered on the bond. If the complainants had voluntarily dismissed the injunction suit without connivance or benefit to the defendants, the position of the State court would be correct, for the simple reason that the defendant would be estopped to deny that final judgment had been rendered, the policy of the law being to hold such a dismissal equivalent to final judgment in the cause. That is the exception and the only exception to the rule which we here invoke.

The case of *Col. H. V. & T. Rwy. Co. vs. Burke*, 54 O. St. 98; 43 N. E. 282, will be found upon examination to be a very thorough and careful review of the authorities applicable to this principle of law, the reasoning of which brings this case clearly within the rule. For the convenience

of the court we quote from this decision. The court said:

"In all the cases with which we are familiar, or that have been cited in argument, the courts have required, as a necessary predicate in an action on the bond, a judicial determination of the merits of the case in favor of the defendant in the action in which the bond was given, either in a trial on the merits, or on a motion to dissolve the injunction, except those where the plaintiff dismisses his action without the consent of the defendant. In the excepted cases, for reasons just given, he is estopped from insisting on the terms of the bond, and in none others."

[After citing a large number of authorities, the court continued:]

"These cases, and many similar ones, all illustrate the principle heretofore stated — that no recovery can be had on a bond or undertaking, except in strict accordance with its terms. There must be a showing that it has been determined by the court that the injunction should not have been granted, and also that any agreement between the parties, subsequent to the allowance of the injunction, by which the action is dismissed and the injunction dissolved, is not sufficient in an action on the bond, where there has been no judicial determination that the injunction should not have been allowed."

See, also, *Cassem vs. Ernst*, 84 Ill. App. 70, wherein the court said:

"The words in an injunction bond that the surety is to 'pay the damages resulting to the obligee by reason of the issuing of the injunction

in case the same shall be dissolved,' mean a dissolution by order of court, either in a final decree upon a motion to dissolve or upon the complainant's failure to prosecute the suit, and not a dissolution by agreement of the parties upon a settlement of all or a part of the controversies involved."

The Supreme Court of Kansas also seeks to avoid the force of this point by the following statement appearing upon page 658 of 61 Kan. 285, of the record:

"Before the complainants voluntarily dismissed their bill for injunction, a hearing was had as to the rightfulness of granting it in the first instance. Upon that hearing an order dissolving the injunction was made."

This was the order made by Judge Caldwell at Little Rock, notwithstanding which the cause proceeded, pleadings were filed, and the case was making due progress. Nothing was to be assumed at the time the bond was given that the rightfulness of the order of Judge Caldwell would not be contested upon the final hearing of the cause and upon appeal duly taken to the United States Circuit Court of Appeals. The court therefore could not contend that the order dissolving the injunction made before the bond was given was tantamount to a dismissal of the case or

obviated the necessity of a final decree or prevented the ultimate determination of the cause by the United States Circuit Court of Appeals. But the court goes on further to say that while in chancery practice the rightfulness of all interlocutory orders come up for review again upon final hearing, yet, unless reversed or otherwise changed upon the final hearing, they become final decisions either as of the time when made or as of the time of review.

It is obvious that the court here got into a quagmire of contradictions. It does not state that the final hearing of the decree upon review relates back to the time of the making of the interlocutory order dissolving the injunction; but whether it does or not, the stipulation here was filed before there was a final hearing or an opportunity had for review, and as will be seen hereafter in this brief, the opinion of the Circuit Court of Appeals which was introduced as evidence in this cause, discloses the fact that by reason of this very stipulation the court was precluded from reviewing the rightfulness of the interlocutory order dissolving the injunction. Certainly, at no time or at no stage of the cause did the interlocutory order dissolving the injunction

become final by any adjudication of the court itself. In other words, the Supreme Court of Kansas bases its decision in holding that the condition of this liability happened upon two grounds, inconsistent with each other, and the existence of one of which necessarily rendered impossible the other. If the court found in the record anything upon which to support its assertion that there had been a final determination, it inevitably follows that the stipulation could not have had the effect asserted by the United States Circuit Court of Appeals. In brief, this proposition that the contingency upon which liability depended had never happened was avoided by the Supreme Court of Kansas and was not fairly considered or decided.

VI.

The Action on the Bond was Prematurely Brought.

By reference to the statement of the case, it will be seen that the decree in the Circuit Court was entered on the 26th day of September, 1892; that such decree dismissing the bill as to Joab Mulvane contained a declaration that the plaintiffs at once prayed an appeal from such decree and

that such appeal was allowed and a supersedeas bond fixed. It was admitted at the hearing by stipulation of fact included in the record, and referred to in the statement heretofore made, that such appeal was regularly taken and within time and supersedeas bond duly given, and that such appeal was pending and undetermined in the United States Circuit Court of Appeals at the time this suit was brought (p. 260).

Upon page 241 of the record the following assignment of error will be found, which was contained in the record in the Circuit Court of Appeals.

"1. The court erred in dissolving the temporary injunction theretofore granted against the defendant, Joab Mulvane."

And this was one of the questions presented to said court upon the appeal.

By reference to the injunction bond, it will be seen that the defendant surety obligated himself to pay all damages which they, the obligees, or either of them, "have already sustained or may at any time sustain, by reason of the granting or issuing of said restraining order, or the granting and issuing of said temporary injunction, if it shall be *finally decided* that said restraining order or

said temporary injunction ought not to have been granted" (p. 7). The question, therefore, to determine is at what particular stage or period of these proceedings can it be said to have been finally decided that the injunction against Joab Mulvane was wrongfully granted. We say that it was not finally decided until the appeal, which had been allowed by the Circuit Court entering the decree, had been passed upon and decided by the Circuit Court of Appeals to which it was referred. This question that the action was prematurely brought was presented to the trial court by objections to testimony, by the answer, by instructions duly requested, and by the motion for new trial (pp. 2, 11, 269, 277). The court gave the following remarkable instruction (p. 272):

"5. Where a suit is commenced and a temporary injunction granted and thereafter set aside, the party against whom the injunction is granted may recover upon the injunction bond given whatever actual damage he has sustained by reason of the wrongful issuance of the injunction, and the person against whom the injunction is granted may maintain an action upon the injunction bond for damage sustained at any time after the temporary injunction has been set aside or the injunction branch of the case abandoned by the plaintiff. He is not required to wait until the main action is terminated.

In this case, then, if you find from the evidence

that prior to the commencement of this suit a temporary injunction had been issued in the case in the Federal court and had been set aside or the injunction branch of the case abandoned by the plaintiffs in that suit, then the defendant or defendants against whom the injunction had been issued could maintain an action to recover the damages sustained by reason of the wrongful issuance of the injunction."

This is so clearly not the law, and it is so clearly beyond the province of the jury to determine a fact of this character, which is addressed wholly to the court upon undisputed facts as a conclusion of law, that we do not think we care to discuss the erroneous character of it at length.

This instruction is also erroneous as being a misstatement of the rules established by the Federal court in chancery proceedings. The rule is so well known that it needs no citation of authority, that all interlocutory orders and motions come up for review at final hearing and before final hearing it cannot be determined what the court's ultimate view shall be as to the rightfulness or wrongfulness of issuing a preliminary injunction order or of dissolving an injunction.

The review in the appellate court of a chancery cause is in essence a trial *de novo*, and the court may in such cause examine anew and reconsider

all the testimony which has been introduced and preserved. In finally determining the cause in the appellate court such court is in no respect bound by the decree of the Circuit Court, and if it should find after an examination of the entire record that the decree of the Circuit Court should be in any wise changed or modified or affected, the appellate court may make a decree in the cause, and cause it to be entered by the Circuit Court, which last decree becomes and is the final decree in the case. The decree made by the appellate court and thus directed to be entered is the final decree and may not thereafter be in any wise modified or affected by the Circuit Court.

This has been the universal interpretation of the effect of an appeal by this court. See among other cases:

Sibbald vs. U. S., 12 Pet. 488, 490.

Stewart vs. Salamon, 97 U. S. 361.

Southard vs. Russell, 16 How. 547.

Durant vs. Essex, 101 U. S. 555.

Kingsbury vs. Buckner, 134 U. S. 650.

Smelting Co. vs. Billings, 150 U. S. 31.

Gaines vs. Rugg, 148 U. S. 228.

The whole question came up for discussion in the recent case of *The Bissell Carpet Sweeper Co. vs. Goshen Carpet Sweeper Co.*, 19 C. C. A. 25, Circuit Court of Appeals, Sixth Circuit.

Also, see, *Metcalf vs. City of Watertown*, 16 C. C. A. 37, Seventh Circuit.

It is clear, then, that as to a cause in chancery it cannot be said to be finally decided and determined when appealed until the record in the case has been finally examined by the appellate tribunal and the whole matter reviewed and decided. By reference to Daniell's Chancery Practice and Procedure, it will be seen that bills of review or for rehearing in the Court of Chancery are put in the same category as appeals to the House of Lords. In their essence they are the same. They involve of necessity a retrial, and, as is said again and again in the opinions to which this court's attention has just been directed, an examination of the *merits* of the cause.

If there be any court, therefore, after the case has been tried in the Circuit Court, that has a right to re-examine the merits and to finally, as was said by the court, "determine and decide," then the case cannot be said to be "finally decided" until the decision of such appellate tri-

bunal has been made and entered. As was said by Judge Lurton in the Bissell Carpet Sweeper Co. case, the affirmance of the decree of the lower court is an adoption of such decree by the appellate court; but it is the decree of the appellate court, nevertheless, and it may not be altered or affected in any respect by the trial court after it has been directed to be entered. Speaking of the effect of the decision, Judge Lurton, in the Bissell Carpet Sweeper Co., says:

"If that decision [namely, the decision in the appellate court] was an affirmance of the decree below, *that decree becomes the decree of this court*, and is no longer open to review, rehearing or modification, for it has become the settled law of the case."

And again:

"If no error was found in the decree appealed from, there was a direction that the decree be affirmed. The effect of such an affirmance was to adopt the decree below as its decree, which from thence was no longer subject to alteration. If there was not a concurrence with the decree appealed from, the court did not content itself with merely reversing it, but clearly directed the lower court as to the decree which should be entered; and, if it was so possessed of the whole record as to enable it to see and adjudge that the complainant had no equity in his suit, the court would not only direct a reversal of the decree appealed from, but terminate the litigation by a direction that the bill should be dismissed."

See, also:

Morgan's, etc., Co. vs. Railway Co., 32 Fed. 525.

Morrin vs. Lawler, 91 Fed. 693.

What, then, was the jurisdiction of the Circuit Court of Appeals in this case? It had jurisdiction not to review alone, although incidentally it might review the decision of the lower court, but it had jurisdiction to examine and to decide, to make an entirely new decree and one that had never been contemplated by the parties or the court below, and to order that decree to be entered in the cause, and when so entered it was the first and only final decree upon the subject under contention. Therefore, we contend that, having appealed the entire cause as it stood to the Circuit Court of Appeals and by appropriate assignment of error presented the question of the rightfulness of the order dissolving the temporary injunction, until that court had passed upon the question of the rightfulness of such order, it was not and could not be finally decided whether or not such interlocutory injunction was rightfully granted or was wrongfully dissolved.

This subject was discussed and learnedly con-

sidered in the case of *Cohn vs. Lehman* 93 M
574, presenting a case almost exactly parallel
the case at bar. See, also, the case of *Hamill*
vs. The State, 32 Md. 348, in which the view
which we contend for were upheld and the su
instituted under like circumstances to this w
held to have been prematurely brought.

In the Missouri case, the defendant in the su
on the bond had averred by his plea the prosecu
tion of an appeal from the decree of dismiss
entered by the Supreme Court of the Unite
States, but the trial court had held that inasmuc
as a supersedeas bond had not been given th
judgment in the United States Circuit Court wa
final and that an action had accrued upon th
injunction bond. The contrary was held by th
Supreme Court of Missouri. The court said:

"It follows in this case, then, that, althoug
the injunction was dissolved in the District Cour
before final hearing, yet no right of action accrue
on the bond, or could accrue, until a final decre
had been rendered in the cause in which such
bond was given. A final decree was rendered i
said District Court in said cause, dismissing plain
tiff's bill, but by the appeal to the Supreme Court
such decree, as well as the whole cause, was
removed to the Supreme Court for review, and
its operation as a final decree was suspended, and
so remained suspended at the time of the institu
tion of this suit, and by the action of the Supreme

Court, whenever action shall be taken on such appeal, the decree of said District Court may be reversed, the plaintiff's bill be reinstated, the order dissolving the injunction set aside, and a perpetual injunction granted, and a breach of the condition of the bond become impossible. If, therefore, a valid appeal has been taken to the Supreme Court of the United States in said equity suit, and such appeal was pending in said court at the time this suit was instituted, plaintiff had no cause of action on the bond."

See, also:

Howard vs. Park, 59 How. Pr. 344.

Musgrave vs. Sherwood, 76 N. Y. 194.

Gray vs. Veirs, 33 Md. 159.

Penny vs. Holberg, 53 Miss. 567.

Murfree on Official Bonds, sec. 391.

The last mentioned authority, in section 392, states the law, with appropriate citation of authority, to be that the statute of limitations does not begin to run in favor of a surety upon an injunction bond during the pendency of the appeal.

See, also, generally, sec. 1648, *et seq.*, High on Injunctions.

But it may be contended that by the opinion of the Circuit Court of Appeals, it appears that the Circuit Court of Appeals has said that complainants in the original suit could not have a review of the rightfulness of this interlocutory order,

because they had stipulated to dismiss certain of the defendants and to ask for damages for the breach of their contract as they might. Granting this to be true, when can this be said to have been finally determined? Had the defendants any right to anticipate such determination until the Circuit Court of Appeals had so decided? Could the State court, before the Circuit Court of Appeals was even addressed upon the subject, or had pronounced its opinion, substitute its judgment and determination for that of the only tribunal entitled to finally pronounce upon the subject? And was the State court, as it has done in its instruction, authorized to submit to the jury the question whether Mr. Mulvane might so substitute his judgment before the determination of the Circuit Court of Appeals had been reached?

The State court accepted jurisdiction of this case on the bond, and might, under its rules, have tried and determined it long before a decision could have been reached in the Circuit Court of Appeals. In so doing it assumed a jurisdiction to pass upon and determine the very questions that were involved in the appeal and assigned as errors to be heard in the Circuit Court of Appeals, and assumed thereby to pass upon the effect of a

record in a case that was not before it and of which it never had a vestige of jurisdiction, and at a time when all jurisdiction connected with the case was lodged by virtue of this appeal with the Circuit Court of Appeals. The question and the important question that was in the case, was whether Judge Caldwell had jurisdiction at Little Rock, the United States Circuit Court for the District of Kansas being in session and Judge Foster being within the district, to hear and determine the motion that was made to dissolve the injunction. Such question was fairly presented to the Circuit Court of Appeals and might have been determined by that court. How could the State court entertain jurisdiction of this case on the bond without determining that question, and had it any power, right or authority to determine that, by virtue of the stipulations entered into, the Circuit Court of Appeals was deprived from affording a review of that question? Suppose the Circuit Court of Appeals had taken the contrary view and had held in terms that Judge Caldwell had no jurisdiction to make such an order, and that the order originally made by Judge Foster granting the temporary injunction still stood unaffected, would or would not such determination abate the

suit commenced in the State court? Or could the State court reverse that decision or, as it has done in this instance, refer its determination to the arbitrament of a petit jury?

Again, it will be observed that the case was not dismissed against Joab Mulvane, but by consent of all the parties to the cause the bill was retained as against Mulvane, with the understanding that the cause should be tried and that damages should be assessed by the court in lieu of a decree of specific performance as for a breach of said contract, if the court was of opinion that the appellants were originally entitled to specific performance. The time for taking of proof was apportioned between the complainants and the defendant Mulvane, the cause was continued over a number of terms of court by mutual agreement and a large amount of testimony was taken upon the issue of damages and upon the merits of the cause.

Now, it cannot be contended, with the record in this condition, Mulvane was in any position to institute an action for damages against Tullock upon the injunction bond. If the effect of the stipulation was as contended by his counsel, any

right which Mulvane had must have been contingent in its character, because, if the complainants should be ultimately successful in the recovery of damages against him, it would conclusively establish not only that he was entitled to nothing upon the injunction bond, but that as against him the injunction was rightfully obtained in the first instance. The controversy between Mulvane and the complainants was by no means terminated. The same elements of complaint and defense were preserved between them. The decree which was rendered by the Circuit Court was in favor of Mulvane for costs. That represented at the time the entire amount of his recovery against the complainants, and it was all that needed to be superseded. A supersedeas bond was given, as shown by the admission of facts, and therefore this entire controversy between the complainants and the defendant Mulvane was transferred to the United States Circuit Court of Appeals. That tribunal unquestionably had the power to reverse this judgment and to direct a decree in favor of the complainants for the damages shown by the proof. This case is not unlike that of *Thompson*

vs. McNair, 64 N. C. 448, the syllabus of which is as follows:

"An injunction obtained by plaintiff at law, in order to preserve property in litigation until the determination of the suit at law, having been dissolved, held that no reference to ascertain damages sustained by the defendant because of such injunction or other proceeding upon the injunction bond could be had until after the determination of the suit at law."

The court in this connection (p. 448), says:

"It cannot be known judicially that the injunction was wrongfully sued out until the action at law is disposed of. Suppose the defendant should be allowed to have judgment in this proceeding, on the ground that there was not probable cause, and afterwards the action at law be decided in favor of the plaintiff, he would be entitled to recover back the very damages that the defendant now seeks to recover, and the record of the court would be inconsistent and contradictory.

An injunction in aid of an action at law, to preserve the property pending the suit, is of rare occurrence. The fact that, in order to make a report, the commissioner in equity felt constrained to pass upon the legal title in anticipation of the judgment in the suit at law, presents a legal absurdity, which the courts avoid in judicial proceedings. An analogy may be found in the action for malicious prosecution. It is settled that the action cannot be maintained until the indictment is finally disposed of, either by an acquittal or a *nol. pros.* Otherwise, the defendant might recover damages and be afterwards convicted of the offense, and thus the record be made to contradict itself."

We therefore conclude upon this head:

First. That no action could lie upon this bond pending the appeal to the United States Circuit Court of Appeals.

Second. That the State court during such appeal had no power or authority to construe the stipulation of October 7, 1890, or to determine its effect upon the jurisdiction of the United States Circuit Court of Appeals to review the case presented to it.

Third. That the bill having been retained by consent with the understanding that the case should be tried and damages assessed by the court in lieu of a decree for specific performance, and an appeal having been taken, Mulvane was in no position, pending the appeal, to bring a counter action for damages against the complainant.

Fourth. That therefore, under no aspect of this case, can it be said that there was a final decision or that a right of action accrued upon this bond until the mandate from the Court of Appeals had been filed.

In conclusion, we respectfully submit that the judgment of the Supreme Court of Kansas should be reversed with instructions to direct the District Court of Shawnee County to sustain the plea that

the action was prematurely brought; and further, that the rule announced by this court governing the measure of liability upon Federal injunction bonds should be sustained and enforced in this case.

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